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n476. 2 Cong. Rec. 4083 (May 20, 1874).

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The predictions of catastrophe nonetheless affected some members of Congress who were generally sympathetic to civil rights. Representative Ellis H. Roberts of New York, for example, could sound almost Sumneresque in his support of equality under both the recent Amendment and the Declaration of Independence. But during the final deliberations in the House he attempted to persuade his fellow Republicans to make peace with the idea of segregated education, citing threats that "if we do insist upon mixed schools, then in certain States of the South schools will be abandoned altogether." n477 Even General Butler, in his final speech on the subject, when defeat was in the air, expressed concern that "there is such a degree of prejudice in the South that I am afraid that the public-school system, which has never yet obtained any special hold in the South, will be broken up ...." n478

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n477. 3 Cong. Rec. 981 (Feb. 4, 1875). Roberts advocated a policy of "equal privileges," as opposed to mandatory integration of public schools, so that "in certain localities they can have the same schools for blacks and whites if so desired" without risking the backlash threatened by opponents of desegregation. Id.

n478. 3 Cong. Rec. 1005 (Feb. 4, 1875).

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4. Hostility to Enforcement of the Fourteenth Amendment

For the most part, opposition to school desegregation in the debates of 1871-75 was framed - whether sincerely or not - in terms of either the practical effect on education or the theory that separate education is not unequal or unconstitutional. But some speeches betrayed a hostility to the very ideal of equality under the Fourteenth Amendment. Representative William Robbins of North Carolina boldly stated that it was "time to recur to the doctrine in which is bound up the salvation of this country - the doctrine that this is the white man's land and ought to be a white man's government." n479 He regretted that it was "impossible to [*1047] undo what has been done" in furtherance of racial equality - presumably a reference to the Reconstruction Amendments and legislation enforcing them - and was adamantly opposed to doing more. Senator Eli Saulsbury of Delaware questioned whether the Fourteenth Amendment had any "legal or binding force in law," n480 and declared:

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n479. 2 Cong. Rec. 900 (Jan. 24, 1874); see also id. at 419 (Jan. 6, 1874) (statement of Rep. Herndon) (criticizing the Fourteenth Amendment for "trenching upon the reserved rights of the independent sovereign States" and commenting that the loss of state power "has been a loss to liberty itself"); Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872) (statement of Sen. Blair) (criticizing

the Fifteenth Amendment for conferring the vote "upon a mass of ignorant, uneducated, semi-barbarous people").

n480. Cong. Globe, 42d Cong., 2d Sess. app. at 9 (Jan. 30, 1872). This criticism was a reference to the irregularities in the ratification process. For a recent discussion of those irregularities, see Bruce Ackerman, We the People: Foundations 44-46 (1991). Ackerman observes that "the Reconstruction amendments - especially the Fourteenth - would never have been ratified if the Republicans had followed the rules laid down by Article Five of the original Constitution. The Republicans were entirely aware of this fact, as were their conservative antagonists." Id. at 44-45.

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I am placed under the most binding obligation to maintain for my race that superiority to which it is entitled by the decrees of God himself, and here in the council of my country I proclaim that no act of mine shall assist to drag it down and place it on an equality with an inferior race. n481

He called support for the bill "treason to the white race." n482

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n481. Cong. Globe, 42d Cong., 2d Sess. app. at 9 (Jan. 30, 1872).

n482. Id.

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Some Southern opponents purported to be speaking for their black as well as their white constituents, n483 but others frankly spoke in the name of the white population of their states, with thinly veiled threats of violence or even genocide. Senator Saulsbury predicted "hatred and animosity" between the races, if not "public disorder and conflict," if the civil rights bill were to pass. n484 A Democratic congressman from Kentucky made a speech in which he asked the Republican supporters of the bill "in behalf of the white children of my district" not to destroy their schools. Passage of the desegregation bill would disturb the "quiet" that then existed between the two races, he stated, "perhaps ending in a war of the races; and when that occurs, the black race in this country will be exterminated." n485 Senator Blair intermixed advocacy [*1048] against the bill with statements in favor of removing blacks from American society and transporting them to the tropics. n486

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n483. See, e.g., 2 Cong. Rec. app. at 316 (May 22, 1874) (statement of Sen. Merrimon); 2 Cong. Rec. at 555 (Jan. 10, 1874) (statement of Rep. Vance); id. at 381 (Jan. 5, 1874) (statement of Rep. Stephens); Cong. Globe, 42nd Cong., 2d Sess. 3262 (May 9, 1872) (statement of Sen. Alcorn).

n484. Cong. Globe, 42d Cong., 2d Sess. app. at 11 (Jan. 30, 1872).

n485. 2 Cong. Rec. 406 (Jan. 6, 1874) (statement of Rep. Durham).

n486. See Cong. Globe, 42d Cong., 2d Sess. 3251-52 (May 9, 1872).

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Republican supporters of the bill were quick to claim that the entire opposition was motivated by such sentiments and to question the credibility of constitutional arguments made by opponents of the Fourteenth Amendment. Senator Morton stated derisively that Blair's "reactionary" and "antediluvian" views were representative of his political party. n487 Senator Pratt commented: "I regret to say that the argument [against the bill] begins and ends in prejudice - a prejudice as unreasonable as it is unjust ...." n488 Senator Pease said that these arguments "might have been expected" from "a party which has opposed every measure looking to the protection and elevation of a certain class of American citizens." n489 Senator Edmunds dismissed the constitutional arguments of Senator Thurman - the leading Democratic opponent of the bill in the Senate - with the gibe that

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n487. Id. at 3253. Blair's comments also elicited strong retorts from Senators Wilson, id., and Flanagan, id. at 3255-56.

n488. 2 Cong. Rec. 4082 (May 20, 1874).

n489. Id. at 4153 (May 22, 1874); see also id. at 409 (Jan. 6, 1874) (statement of Rep. Elliott) (denouncing the "vulgar insinuations" and "illogical and forced conclusions" of the opposition and stating that "reason and argument are worse than wasted" on them).

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nobody would doubt what is the attitude of my friend from Ohio upon the constitutionality of this provision. Nobody can doubt what his attitude would have been on the civil rights bill [of 1866] had he been here. Perhaps nobody doubts what his attitude is as to the constitutionality of the fourteenth amendment itself. n490

Representative Stowell of Virginia commented on a resolution by his state's legislature opposing the bill: "It looks very much as if the democratic Legislature of Virginia was willing to recognize the fourteenth amendment to the Constitution of the United States if Congress would only prevent it from being carried into execution ...." n491

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n490. Cong. Globe, 42d Cong., 2d Sess. 731 (Jan. 31, 1872).

n491. 2 Cong. Rec. 426 (Jan. 6, 1874).

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It is impossible to tell what proportion of the opposition to the school desegregation bill was based on a hostility to the idea of legal equality altogether. Republican supporters suggested it was large. They are a biased source; but they also were in a position to [*1049] know. Whether large or small, this element of the opposition should be disregarded when attempting to discern the original meaning of the Fourteenth Amendment. That some leading citizens opposed the Amendment and all that it stood for does not tell us anything about what the Amendment meant. Indeed, the presence of this body of opinion shows that the size of the vote against the civil rights bill, minority though it was, overstates the strength of the position that segregated schools were deemed, in good faith, to be consistent with the Fourteenth Amendment.

III. Votes on the Desegregation Measure

The previous Part recounted the constitutional (and other) theories of the proponents and opponents of what would become the Civil Rights Act of 1875. n492 Even without more, this history would suffice to show that a substantial number of the leading supporters of the Fourteenth Amendment believed that segregated education was unconstitutional. This Part will recount the progress of the bill through Congress and the many votes on the measure. It provides the basis for evaluating the prevalence of the opinion that segregation is unconstitutional.

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n492. 18 Stat. 335 (1875).

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When analyzing the votes, I will sometimes use partisan affiliation as a proxy for support or opposition to the Fourteenth Amendment. Support for the Fourteenth Amendment in 1866 was almost exclusively a Republican phenomenon. In the House of Representatives, the Amendment carried by a vote of 120-32. n493 Every Democrat, and only one Republican, voted against it. In the Senate, the Amendment carried by a vote of 33-11. n494 Republicans supplied 32 of the 33 votes. In the absence of contrary evidence, I will therefore assume that Republicans were supporters, and Democrats opponents, of the Amendment.

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n493. Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866).

n494. Id. at 3042 (June 8, 1866).

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A. Attachment of the Civil Rights Bill as a Rider toAmnesty

Sumner's initial proposal would "secure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public

entertainment, common schools, and institutions of learning [*1050] authorized by law, church institutions, and cemetery associations incorporated by national or State authority; also on juries in courts, national and State." n495 The bill clearly took a sweeping view of the authority of Congress to forbid discrimination in private institutions, even including churches. Apparently, Sumner's understanding of "state action" encompassed any association incorporated under law, and the provision pertaining to jury service may have suggested application to political (in addition to civil) rights. In these respects, Sumner went well beyond the prevailing understanding of the reach of the Amendment.

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n495. Cong. Globe, 41st Cong., 2d Sess. 3434 (May 13, 1870) (statement of Sen. Sumner).

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In the course of the deliberations, supporters of the bill persuaded or forced Sumner to narrow its coverage in several important respects. In Sumner's original proposal, private schools were covered if they enjoyed the benefits of incorporation; but on Sumner's own motion (made at the suggestion of Senator Roscoe Conkling), this feature of the bill was struck, leaving within the ambit of the bill only those schools that were supported by "general taxation" or "authorized by law." n496 Later in the debate, he accepted a similar amendment as applied to cemeteries and benevolent institutions, limiting coverage to those "of a public character." n497 Application of the Act to churches came in for particular criticism on religious freedom grounds, n498 but Sumner defended it, with support from Senator Sherman of Ohio. n499 Senators Freling [*1051] huysen, n500 Morton n501 and Carpenter n502 argued that application of the civil rights bill to a church that sought to exclude persons of a different race would violate the First Amendment. This argument is particularly interesting in light of the Supreme Court's 1990 holding that the First Amendment, as applied to the states through the Fourteenth, does not protect churches from neutral laws of general applicability inconsistent with the tenets of their faith. n503 Churches eventually were eliminated from the bill. n504

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n496. Cong. Globe, 42d Cong., 2d Sess. 3267 (May 9, 1872) (statement of Sen. Sumner).

n497. Id. (statement of Sen. Boreman).

n498. See id. at 897-98 (Feb. 8, 1872) (statement of Sen. Corbett); id. at 897 (Feb. 8, 1872) (statement of Sen. Anthony); id. at 847-48 (Feb. 6, 1872) (statement of Sen. Frelinghuysen); id. at 759 (Feb. 1, 1872) (statement of Sen. Carpenter); id. app. at 10 (Jan. 30, 1872) (statement of Sen. Saulsbury); id. app. at 5 (Jan. 25, 1872) (statement of Sen. Lot Morrill).

n499. See id. at 823-26 (Feb. 5, 1872) (statement of Sen. Sumner) ("Here is nothing of religion - it is the political law, the law of justice, the law of equal rights."); see also id. at 896 (Feb. 8, 1872) (statement of Sen. Sumner); id. at 843 (Feb. 6, 1872) (statement of Sen. Sherman) (saying that it is "dividing hairs" to extend coverage to railroads and inns but not to churches,

and that "any church association that would exclude a man because of his color from worshiping God within its walls is a heathen church; it is not a Christian church"). Sherman later voted to drop the reference to churches in deference to the arguments of colleagues and to strengthen support for the remainder of the bill. Id. at 897 (Feb. 8, 1872).

n500. Id. at 847-48 (Feb. 6, 1872); id. at 896 (Feb. 8, 1872).

n501. Id. at 898 (Feb. 8, 1872).

n502. Id. at 759 (Feb. 1, 1872).

n503. See Employment Div. v. Smith, 494 U.S. 872, 876-82 (1990); see also Ira C. Lupu, Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, 67 B.U. L. Rev. 391, 416-31 (1987) (arguing that churches are not entitled to absolute exemption from antidiscrimination laws). The 1875 Act debates support the argument in Kurt T. Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994), that the framers of the Fourteenth Amendment understood free exercise as a substantive liberty rather than merely a protection from discrimination or prosecution.

n504. Cong. Globe, 42d Cong., 2d Sess. 899 (Feb. 8, 1872). The vote was 29-24. Id. Much of the opposition to this change came from opponents of the entire measure, who hoped to defeat it by making the bill as "obnoxious" as they could. See, e.g., id. at 896 (statement of Sen. Trumbull); id. at 897 (statement of Sen. Thurman).

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As discussed above, the Chairman of the Senate Judiciary Committee, Lyman Trumbull of Illinois, opposed Sumner's proposal. n505 Under his leadership in both the Second and the Third Sessions of the Forty-first Congress, the Judiciary Committee reported adversely on Sumner's bill, n506 apparently unanimously, n507 and it died. It would be a mistake to assume, however, that Trumbull's constitutional reservations necessarily were shared by the rest of the Committee. Two members of the Committee, Conkling and Edmunds, later stated that the bill had been rejected "chiefly on the ground that the civil rights bill [of 1866] was adequate to accomplish the protection which the citizen was entitled to" - a position they soon became convinced was wrong. n508

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n505. See supra text accompanying notes 317-77.

n506. Cong. Globe, 41st Cong., 2d Sess. 5314 (July 7, 1870); Cong. Globe, 41st Cong., 3d Sess. 1263 (Feb. 15, 1871).

n507. Cong. Globe, 42d Cong., 2d Sess. 730 (Jan. 31, 1872) (statement of Sen. Lot Morrill).

n508. Id. at 731 (statement of Sen. Edmunds). Senator Thurman, a Democratic member of the Committee, challenged their account and stated that his opposition had been based on constitutional grounds. Id.

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Whatever the grounds of its opposition, the Committee's action forced Sumner to seek an alternative procedural vehicle. Accordingly, Sumner proposed his civil rights bill as a rider to a popular "amnesty" bill, lifting political and civil disabilities from former officers of the United States or of the states who had engaged in rebellion against the Union. Under Section 3 of the Fourteenth Amendment, various persons were excluded from public office if they had previously violated their oath to support the Constitution by backing the Confederate rebellion, but Congress was permitted to lift this disability by a two-thirds vote. n509 It was to such a bill that Sumner attached his civil rights measure. The advantage of this strategy, in addition to bypassing Trumbull's committee, was that it would place Sumner's Democratic opponents in the embarrassing position of either voting for Sumner's civil rights bill or against the amnesty measure. The disadvantage was that legislation containing the amnesty provision required a two-thirds vote from both houses of Congress; thus, a mere one-third of either house, adamantly opposed to desegregation, could defeat the measure.

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n509. U.S. Const. amend. XIV, 3.

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It must be noted, moreover, that this linkage of the civil rights bill and the amnesty bill complicates using the deliberations as a source of information about the understood meaning of the Fourteenth Amendment. It has been suggested that some opponents of amnesty supported Sumner's proposal as a clever strategy for defeating the otherwise popular amnesty bill, without necessarily sharing Sumner's views on segregation. Historian Alfred Kelly attributes the "extraordinary popularity" of Sumner's proposal among the Senate Republicans to the fact that "they now saw in Sumner's rider a delightful weapon to deal with the menace [of the amnesty bill]." n510 However, this conjecture appears to be incorrect. More likely, the votes on the rider understated the depth of support for desegregation; several senators expressed their support for Sumner's position, but opposed the rider because it was an impediment to amnesty, which they also supported. Kelly claims that Senators Morton, Conkling, Edmunds, Nye and Chandler were " "suddenly converted to Mr. Sumner's way of thinking, [*1053] because it is the only way amnesty can be defeated without appearing to oppose the President.' " n511 But with the exception of Nye, who lost his Senate seat in 1873, each of these men voted or spoke in favor of desegregation after these strategic considerations had passed. n512 Indeed, not a single senator who voted in favor of Sumner's rider voted against Sumner's later freestanding desegregation legislation. By contrast, at least four senators opposed the rider despite their support for desegregation, because of the impact on amnesty, n513 and at least one senator who was opposed to amnesty voted for the combined bill as a result of the rider. n514 Moreover, when it became evident that the rider would have the effect of blocking the amnesty bill and that neither measure would pass, Sumner's Republican supporters deserted him and voted for amnesty. n515 This course of events casts serious doubt on Kelly's thesis.

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n510. Kelly, supra note 21, at 547.

n511. Id. at 547 n.43 (quoting N.Y. Trib., Jan. 24, 1872).

n512. See 2 Cong. Rec. app. at 358-61 (May 21, 1874) (statement of Sen. Morton); 2 Cong. Rec. 4176 (May 22, 1874) (reporting votes by Sens. Conkling and Edmunds in favor of a freestanding civil rights bill, with Sen. Chandler paired in favor of the bill).

n513. These were Senators Sawyer, Robertson, Fenton, and Cragin. See Cong. Globe, 42d Cong., 2d Sess. 272-73 (1872) (Dec. 21, 1871) (statement of Sen. Sawyer that he supported the principles of Sumner's bill but would vote against the amendment because it would "be absolutely fatal to the amnesty bill"); id. at 918 (Feb. 9, 1872) (statement of Sen. Robertson that "I am still ready and willing to vote for the Senator's proposition as a separate measure, but not to attach it to this bill"); id. at 3263 (May 9, 1872) (statement of Sen. Fenton to similar effect); id. at 3196 (May 8, 1872) (statement of Sen. Cragin explaining that he voted for the civil rights rider initially "hoping that both measures might be passed at the same time," but failing that, "being in favor of both these measures, I go for the one that is most likely to pass and become a law, and then, when the proper occasion arises, I shall go for the other"); see also id. at 3251 (May 9, 1872) (statement of Sen. Blair that both senators from South Carolina, plus others, would vote for the bill as a separate measure but not as an amendment to the amnesty bill).

n514. See id. at 3734 (May 21, 1872) (statement of Sen. Hamlin).

n515. See infra text accompanying notes 543-59.

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The first test of senatorial support for Sumner's rider came in December 1871. Opponents challenged Sumner's motion to attach the civil rights bill as a rider to the amnesty bill on the (not implausible) ground that amnesty bills, which were a special creation of Section 3 of the Fourteenth Amendment, were not ordinary legislation and thus could not be combined with extraneous legal provi [*1054] sions. n516 This point of order was rejected by a vote of 28-26. n517 At least one strong supporter of Sumner's bill voted in favor of the point of order on parliamentary grounds. n518 Immediately thereafter, however, Sumner's amendment was rejected by a vote of 29-30. n519 Of those senators who had voted in favor of the Fourteenth Amendment, Sumner's proposal carried a majority of 9-3; of those who had voted against the Amendment, Sumner's proposal lost by a vote of 2-0. n520

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n516. See Cong. Globe, 42d Cong., 2d Sess. 263 (1872) (Dec. 21, 1871) (statement of Sen. Thurman); id. app. at 1 (Jan. 25, 1872) (statement of Sen. Lot Morrill).

n517. Cong. Globe, 42d Cong., 2d Sess. 274 (1872) (Dec. 21, 1871).

n518. Id. at 3183 (May 8, 1872) (subsequent statement of Sen. Hamlin).

n519. Id. at 274 (Dec. 21, 1871).

n520. Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 274 (1872) (Dec. 21, 1871) (reporting the Senate vote on the civil rights bill).

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Sumner reintroduced his civil rights rider to the amnesty legislation later the same day, the last day before the Christmas recess. When the Senate reconvened in January 1872, Sumner's proposal received detailed consideration over several weeks of extended debate. This time, the proposal carried, though by the slimmest of margins. On February 9, 1872, the Senate divided evenly on the proposal, by a vote of 28-28, and Vice President Schuyler Colfax cast the deciding vote in favor, stating that he was "voting upon this amendment as a whole, without concurrence with all the features contained in it." n521 Colfax had been Speaker of the House when the Fourteenth Amendment was adopted, and he was well known for his support of Negro suffrage. n522 Supporters of the Fourteenth Amendment voted for Sumner's rider by a margin of 10-1 (not counting Colfax); the exception was Trumbull. n523 None of the opponents of the Amendment in the Thirty-ninth Congress [*1055] remained in the Senate. Republicans supported the measure by a margin of 28-16; all twelve Democrats voted against. n524

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n521. Cong. Globe, 42d Cong., 2d Sess. 919 (Feb. 9, 1872). Interestingly, the Vice President's vote ran contrary to the policy of the Administration. President Grant favored the amnesty bill and opposed the Sumner rider. Kelly, supra note 21, at 547 & n.44.

n522. 4 Dictionary of American Biography 297-98 (Allen Johnson & Dumas Malone, eds., 1943).

n523. Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 919 (Feb. 9, 1872) (reporting the Senate vote on the civil rights bill).

n524. All partisan affiliations in this Article are derived from Congressional Quarterly, Guide to U.S. Elections (2d ed. 1985) and Congressional Quarterly, Guide to Congress (4th ed. 1991).

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As amended, the amnesty bill lost the support of some of its most ardent advocates, especially among the Democrats. The measure attained 33 "ayes" and 19 "nays," two votes short of the necessary two-thirds. n525 All but one of the negative votes came from senators who had opposed Sumner's rider. n526

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n525. Cong. Globe, 42d Cong., 2d Sess. 928-29 (Feb. 9, 1872).

n526. Compare id. at 919 (Feb. 9, 1872) (reporting the Senate vote on the desegregation amendment) with id. at 928-29 (Feb. 9, 1872) (reporting the Senate vote on passage of the amnesty bill). Only Senator Wright voted in favor of the desegregation amendment, yet subsequently voted against the amnesty bill.

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Three months later, in May 1872, the debate recurred, with similar arguments and an identical result. This time, Sumner proposed his civil rights bill as a substitute - rather than a rider - to the House-passed amnesty bill. Late in the debate, moderate Republican Orris Ferry of Connecticut, an opponent of school desegregation, recoupled amnesty and the civil rights bill by amending Sumner's amendment to include the first section of the original amnesty measure as an additional section. n527 This motion was adopted, 38-14, with some supporters of school desegregation joining the affirmative vote. n528 The bulk of the debate, however, took place while Sumner's civil rights bill was decoupled from the amnesty bill. The complicating factors present in the February vote therefore do not plague us here, and the almost identical outcome further confirms that the votes were dictated by the merits of the civil rights bill rather than by the politics of amnesty.

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n527. See Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872). This move casts further doubt on the hypothesis that the support for coupling the two measures came from opponents of amnesty. See supra notes 510-15 and accompanying text.

n528. Cong. Globe, 42d Cong., 2d Sess. 3263 (May 9, 1872). The remainder of the amnesty bill was subsequently added by amendment. Id.

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The debates in May 1872 presented senators with the opportunity to vote on proposals embodying both of the constitutional theories of the opposition - that education is not a civil right and is therefore not protected by the Amendment, and that segregation does not offend the principle of equality. Orris Ferry's proposed amendment to delete the clause in Sumner's proposal pertaining to [*1056] common schools reflected the constitutional theory that the Fourteenth Amendment did not affect local control over education. n529 The motion lost, 25-26. n530 The second constitutional theory of the opposition was reflected in the amendment to the Sumner bill proposed by Francis Blair of Missouri, who suggested adding the following proviso: "Provided, however, That the people of every city, county, or State shall decide for themselves, at an election to be held for that purpose, the question of mixed or separate schools for the white or black people." n531 This proviso suggests that segregation is not inconsistent with the equality of rights demanded by the Amendment. Blair's motion also lost, by a vote of 23-30. n532 These votes may suggest that support for the former constitutional theory was stronger than that for the latter - a supposition ultimately borne out by the final shape of the 1875 Act.

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n529. See id. at 3256.

n530. Id. at 3258.

n531. Id.

n532. Id. at 3262. The Senate also rejected an amendment proposed by Senator Carpenter to delete the jury provisions from the bill, by a vote of 16-33. Id. at 3263.

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Of the eleven senators who had voted in the Thirty-ninth Congress in favor of the Fourteenth Amendment, ten voted against the Ferry and Blair amendments and in favor of Sumner's bill, and only one - Trumbull - voted the other way. n533 The rejection of these amendments shows that a majority of the Senate - and an even larger majority of Fourteenth Amendment supporters - agreed with Sumner that segregated schooling is inconsistent with the constitutional demand of equality.

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n533. Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 3258 (May 9, 1872) (reporting the Senate vote on the Ferry amendment) and id. at 3262 (reporting the Senate vote on the Blair amendment). The members who supported the Fourteenth Amendment and opposed the Ferry and Blair amendments were Anthony, Chandler, Cragin, Edmunds, Justin Morrill of Vermont (who had voted for the Amendment as a member of the House of Representatives), Pomeroy, Ramsey, Sherman, Sumner and Wilson.

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Having survived hostile amendment, the Sumner bill underwent a complicated series of votes, ultimately leading to the same division as in February. First, as noted above, the Senate adopted a motion to recouple amnesty and civil rights by attaching the amnesty bill as an amendment to Sumner's amendment. n534 Then, [*1057] on a motion by Trumbull to delete the entire substance of Sumner's rider (which would restore the bill to its original form as solely an amnesty measure), the Senate voted 29-29, and the Vice President cast the deciding vote in the negative. n535 The stronger showing of opposition here (as compared to the Ferry and Blair amendments) is attributable to the votes of those like Carpenter, who supported Sumner on school desegregation but not on juries, n536 and of those like Cragin, Sawyer, Robertson and Fenton, who supported Sumner on the merits but did not want to endanger amnesty. n537 Had they voted in favor of the bill, it would have carried by a much wider margin.

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n534. See Cong. Globe, 42d Cong., 2d Sess. 3262-63 (May 9, 1872).

n535. Id. at 3264-65.

n536. Id. at 3196 (May 8, 1872) (statement of Sen. Carpenter).

n537. See supra note 513 and accompanying text. Senator Scott also voted against both the Blair amendment, Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872), and the Sumner amendment, id. at 3264 (May 9, 1872), but he did not explain these apparently inconsistent votes. Perhaps he too was influenced by the political context of amnesty.

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The Sumner amendment as amended (that is, a motion to replace the amnesty bill by the civil rights bill supplemented by the amnesty bill) then failed, surprisingly, by a single vote, 27-28. n538 That left the original House-passed amnesty bill on the floor. Sumner promptly reopened the issue by moving to amend the bill by addition of the civil rights bill. n539 Although in substance (though not in form) this was the identical question on which he had just lost, this time the outcome was reversed. n540 The Senate divided evenly, 28-28, and the Vice President broke the tie by voting in the affirmative. n541 So once again the Sumner bill was attached as a rider to the amnesty bill - precisely the same procedural posture as in February. But, as in February, the combined bill failed to obtain the necessary two-thirds majority. This time the vote was 32-22. n542

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n538. Cong. Globe, 42d Cong., 2d Sess. 3268 (May 9, 1872).

n539. Id.

n540. The change is attributable to Senator Wright, who voted "nay" the first time and "aye" the second. Id. Wright had voted in support of Sumner and his rider the previous February, id. at 919 (Feb. 9, 1872), and he rejected the Ferry and Blair amendments. Id. at 3258, 3262 (May 9, 1872). Most likely Wright's initial vote against Sumner's bill was a mistake. Senator Lewis of Tennessee, who had been absent for the first vote, appeared and voted "nay." Id. at 3268.

n541. Id. at 3268.

n542. Id. at 3270.

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[*1058]

Both sides were stymied by the two-thirds requirement. A majority of the Senate (counting the Vice President) insisted on supporting legislation based on the premise that school segregation violates the Fourteenth Amendment. Between one-third and one-half were adamantly opposed to it. The effect was to defeat both amnesty and the civil rights bill, even though both measures commanded majority support. As Senator Edmunds explained to a weary Senate in the early hours of the morning after an all-night debate: "This subject of civil rights and of amnesty . . . has been before the Senate three or four times, and both bills finally failed because gentlemen who were in favor of each separately would vote against both together." n543 The Republicans were under intense pressure to enact the amnesty measure, which was a leading campaign issue in the 1872 elections, especially in the South. The Democrats engaged in a filibuster to prevent consideration of the civil rights bill. n544 It looked as if

neither measure would pass the Senate before the summer recess, or in time for the fall campaign.

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n543. Id. at 3729 (May 21, 1872) (The actual date of Senator Edmunds' speech was May 22, but because the Senate did not adjourn, the Congressional Globe continued to report the debate as occurring on the legislative day May 21.); see also id. at 3740 (statement of Sen. Sawyer) (noting that "the moment [Sumner] links his civil rights proposition with the amnesty proposition, they are both defeated"); id. at 3260 (May 9, 1872) (statement of Sen. Logan addressed to Sen. Sumner) ("For several months this [civil rights] bill has lain upon your table. There has not been a time that it could not have been passed by a majority of this Senate if you would take it up alone ....").

n544. See id. at 3730-31 (May 21, 1872) (colloquy between Sen. Casserly and Sen. Conkling concerning the civil rights filibuster).

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The impasse was broken on the morning of May 22, while Sumner was absent from the chamber. Edmunds, speaking for the Republicans, announced that they had decided to separate the two measures, n545 in exchange for which the Democrats would agree to a vote on a watered-down civil rights measure, introduced by Carpenter, without further dilatory tactics. n546 The Carpenter bill prohibited inns, places of amusement for which a public license was required, and common carriers from making "any distinction as to admission or accommodation therein, of any citizen of the United States, because of race, color, or previous condition of servi [*1059] tude." n547 It deleted references to schools and juries, the two most controversial features of Sumner's legislation. n548 After debate, the Carpenter bill was substituted for the Sumner bill by a vote of 22-20. n549

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n545. Id. at 3729.

n546. See id. at 3734 (statements of Sens. Blair, Carpenter, and Davis).

n547. Id. at 3730, 3734-35 (statements of Sen. Carpenter). A motion to delete references to places of public amusement was defeated, 14-29. Id. at 3735.

n548. See id. at 3737-38 (statement of Sen. Sumner) (protesting the deletion of public schools and juries, which rendered the substitute "an emasculated civil rights bill").

n549. Id. at 3735.

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Some supporters of Sumner's original bill protested the compromise, and came close to defeating the Carpenter substitute. Senator Spencer said he considered it "emasculating the bill entirely" and hoped "that every genuine friend of civil rights will vote against it." n550 Senator Frelinghuysen commented that "the opinion of the Senate has been expressed over and over again in favor of

retaining the provisions in reference to public schools," and that the omission "very much impairs the effect of the bill." n551 Senator Clayton predicted that if the substitute were adopted, "this vexed question will be still before the country, a source of trouble in future legislative bodies." n552 Other supporters of Sumner's bill argued that the Carpenter substitute, while not all that they hoped for, nonetheless "secured a considerable share of the benefits we hoped to obtain by the passage of [Sumner's] own bill." n553 Sumner later attributed his loss to the fact that the attendance in the Senate was sparse. n554 Others said "it was all we could get at this session of Congress." n555 In any event, Carpenter's modified civil rights bill passed by a vote of 28-14. n556

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n550. Id.

n551. Id.

n552. Id.

n553. Id. at 3740 (statement of Sen. Sawyer); accord id. at 3738 (statement of Sen. Conkling).

n554. See id. at 3738, 3739 (statements of Sen. Sumner) (urging that his motion to reconsider the Carpenter substitute be postponed for decision by the "full Senate").

n555. Id. at 3739 (statement of Sen. Sawyer); accord id. (statement of Sen. Anthony).

n556. Id. at 3736.

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A controlling group of Sumner's supporters on the desegregation rider, including Edmunds, Carpenter, Hamlin, Wilson, and Conkling, thus abandoned Sumner's strategy; but they continued [*1060] to profess support for his ultimate objective. n557 When Sumner arrived on the Senate floor later that morning, he attempted to rally the Republicans to his original strategy, and once more offered his civil rights bill as a rider to the amnesty bill. This time he was voted down, 13-29, n558 and the amnesty bill passed almost unanimously (with only Sumner and Nye voting against). n559

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n557. Several of these senators made speeches emphasizing that their decision to separate the civil rights bill from the amnesty measure did not suggest any lack of commitment to the civil rights bill on their part. See, e.g., id. at 3730 (statements of Sen. Edmunds and Sen. Hamlin); id. at 3732 (statement of Sen. Wilson); id. at 3738 (statement of Sen. Conkling); id. at 3739-40 (statement of Sen. Sawyer).

n558. Id. at 3737-38.

n559. The vote was 38-2. Id. at 3738.

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Events in the House of Representatives turned this compromise into a total defeat for the civil rights advocates. Although the amnesty bill easily cleared the House, Carpenter's civil rights bill was bottled up. A two-thirds majority was required to suspend the rules to take up the bill on the floor of the House. On May 28, a vote to consider the bill carried a majority of 114-83, a comfortable majority but well short of the necessary two-thirds. n560 In two votes taken on June 7, the bill again obtained a majority but not two-thirds. n561 The Carpenter bill never again saw the light of day.

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n560. Id. at 3932 (May 28, 1872).

n561. Id. at 4322 (June 7, 1872). The first vote, on an amended version of the bill containing a maximum penalty for violations and no minimum penalty, was 86-73; the second vote, on an amended version reducing the maximum penalty, was 83-73. Id.

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B. Desegregation Efforts in the House, 1872

While the amnesty rider effort occupied the attention of the Senate, the opponents of school segregation in the House of Representatives attempted to enact a civil rights bill similar to the Sumner measure as freestanding legislation. The bill, H.R. 1647, was introduced by Representative William Frye, Republican from Maine, on February 19, 1872. n562 Applicable to inns, common carriers, theaters and places of public amusement, common schools and other public institutions of learning supported by moneys derived from general taxation or authorized by law, and incorporated cemeteries and benevolent institutions, the bill guaranteed to every citizen "the full and equal enjoyment of any accommodation, [*1061] advantage, facility, or privilege" furnished by the covered entities. n563 The bill specifically provided that private schools, cemeteries, and institutions of learning maintained by voluntary contributions could remain segregated, but that no new such institutions could be created. n564 It also forbade racial discrimination in jury service. n565

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n562. Cong. Globe, 42d Cong., 2d Sess. 1116 (Feb. 19, 1872).

n563. Id.

n564. See id.

n565. Id.

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From the sparse debate on the bill, n566 we can tell that it was understood to require desegregation of the covered institutions. Representative H.D. McHenry, of Kentucky, stated that the bill was "the same" as that presented in the Senate by Sumner, n567 and - as was shown above - the Sumner bill was understood to require desegregation. McHenry, a strident opponent of the bill, described the bill as "giving the negro the right ... to eat at the same table with the most favored guest," n568 and "forcing [the white] child to sit on the same seat with the negro, and to be raised up in fellowship with him." n569 Representative Harper of North Carolina, another opponent, described the bill as saying to the white people, " "You must ride in the same car, eat at the same table, and lodge in the same room with a negro ....' " n570 It is obvious that separate but equal accommodations were not thought permissible under the bill.

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n566. The bill was not debated directly, but several representatives made comments on it during time devoted to general remarks. See, e.g., id. at 1116-17 (statements of Representatives Dawes and Cox).

n567. Id. app. at 217 (Apr. 13, 1872).

n568. Id.

n569. Id. at 218.

n570. Id. at 372 (May 4, 1872).

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The bill was scheduled for consideration during the Monday "morning hour," when the rules of the House precluded debate or amendment. Thus, the opinion of the members must be divined from a series of procedural votes rather than from statements on the floor or more definitive votes on the merits. The Democratic strategy was to prevent an up-or-down vote. Representative Hooper, one of the principal sponsors, complained that the bill "would be acted on at once if gentlemen on the other side would [*1062] not filibuster." n571 On February 19, 1872, the first test of support was on a motion to reject the bill, which failed by a vote of 89-116. n572 There was a perfect congruence between support for the Fourteenth Amendment and support for the bill on this vote. All eleven members of the House who had voted in favor of the Fourteenth Amendment voted in favor of the bill; the three who had voted against the Amendment opposed it. n573 Similarly, the breakdown was almost entirely on party lines. Only three votes in favor of the bill (out of 116) came from Democrats and only three votes against (out of 89) came from Republicans.

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n571. Cong. Globe, 42d Cong., 2d Sess. 2441 (Apr. 15, 1872).

n572. Id. at 1117 (Feb. 19, 1872).

n573. Compare Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866) (reporting the House vote on passage of the Fourteenth Amendment) with Cong.

Globe, 42d Cong., 2d Sess. 1117 (Feb. 19, 1872) (reporting the House vote on the motion to reject the civil rights bill).

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The next test, March 25, 1872, was on a motion by Representative Robert Elliott, a black Republican lawyer from South Carolina, to suspend the rules and take up consideration of the bill. This would require a two-thirds majority. Elliott's motion won the votes of 98 members, with 80 opposed, far short of the necessary two-thirds. n574 On April 1, opponents attempted to kill the measure by tabling it, but the effort failed, 73-99. n575 On April 8, proponents moved an additional step toward passage by successfully moving for engrossment and third reading. This motion passed by a vote of 100-78. n576 At this point, opponents of the bill became alarmed. In a speech delivered April 13, 1872, Representative McHenry interpreted the previous vote as "a test vote" on the degree of support for the bill and stated, "I presume in a short time it will be passed by the same vote which ordered its third reading." n577 He also warned that "this measure was adopted in the Senate as an amendment to the amnesty bill at this session, and it is a well-ascertained fact that if we pass it here it will pass that body and become a law." n578

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n574. Cong. Globe, 42d Cong., 2d Sess. 1956 (Mar. 25, 1872).

n575. Id. at 2074 (Apr. 1, 1872).

n576. Id. at 2270 (Apr. 8, 1872).

n577. Id. app. at 217 (Apr. 13, 1872).

n578. Id.

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On April 15, opponents began a strategy of filibustering the bill by offering a series of motions to table the bill or to adjourn, and demanding roll call votes. n579 This tactic was sufficient to block action during the limited time available during the "morning hour." Their apparent purpose was to force the Republican majority to remove the bill from the morning hour and consider it under a rule that would allow amendment and debate, a course which Republican strategists rejected. n580 The Republicans could summon a clear majority in support of the bill, but not the two-thirds necessary to suspend the rules. Eventually, they gave up in frustration and devoted their energies to a different vehicle for achieving their objective.

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n579. See Cong. Globe, 42d Cong., 2d Sess. 2441 (Apr. 15, 1872).

n580. See id. (statement of Rep. Eldredge).

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C. Renewed Attempts to Pass the Bill, 1873-74

In December 1873, Senator Charles Sumner and the flamboyant former Union General Benjamin F. Butler, now a Representative from Massachusetts and chairman of the House Judiciary Committee, introduced civil rights bills in their respective chambers. n581 The House bill ultimately would be enacted, in modified form, as the Civil Rights Act of 1875. Both bills required desegregation of common schools, as well as of common carriers, inns, theaters, cemeteries, and places of public amusement, and guaranteed the right of jury service without discrimination on the basis of race. n582 The regulation of privately owned facilities such as inns and com [*1064] mon carriers, which would later be its constitutional downfall in the Civil Rights Cases, n583 was the least controversial aspect of the bill. The jury provisions generated the most serious qualms among constitutionally scrupulous members generally sympathetic to the civil rights cause. n584 But it was the schools provision that generated the most intense opposition and dominated the debates, and only the schools and cemetery provisions that ultimately failed to be enacted.

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n581. 2 Cong. Rec. 2 (Dec. 2, 1873) (Senate); id. at 318 (Dec. 18, 1873) (House). Representative Frank Morey, a Louisiana Republican, also introduced a bill, H.R. 473, which was identical to Sumner's. See id. at 97 (Dec. 8, 1873). The bill was referred to the Judiciary Committee, id. at 98, which - not surprisingly - voted out the chairman's bill rather than Morey's.

n582. Sumner's bill, S. 1, provided, inter alia:

That no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by innkeepers; by common carriers, whether on land or water; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation or authorized by law; also of cemetery associations and benevolent associations supported or authorized in the same way: Provided, That private schools, cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by voluntary contributions, shall remain according to the terms of the original establishment.

Id. at 945 (Jan. 27, 1874). In addition, Section 4 of the Sumner bill prohibited racial discrimination in jury service. Id. Butler's bill, H.R. 795, provided, inter alia:

That whoever, being a corporation or natural person, and owner, or in charge of any public inn; or of any place of public amusement or entertainment for which a license from any legal authority is required; or of any line of stage-coaches, railroad, or other means of public carriage of passengers or freight; or of any cemetery, or other benevolent institution, or any public school supported, in whole or in part, at public expense or by endowment for public use, shall make

any distinction as to admission or accommodation therein, of any citizen of the United States, because of race, color, or previous condition of servitude, shall, on conviction thereof, be fined not less than one hundred nor more than five thousand dollars for each offense; and the person or corporation so offending shall be liable to the citizens thereby injured, in damages to be recovered in an action of debt.

Id. at 378 (Jan. 5, 1874) (quoted by Rep. Stephens).

n583. 109 U.S. 3 (1883).

n584. See, e.g., 2 Cong. Rec. 948 (Jan. 27, 1874) (colloquy between Sen. Sumner and Sen. Edmunds regarding jury provision). This debate recalled Senator Carpenter's earlier position in favor of school desegregation but opposed (on constitutional grounds) to the jury provisions. See Cong. Globe, 42d Cong., 2d Sess. 3196 (May 8, 1872). The problem was that the Privileges or Immunities Clause protected "civil" rights but not "political" or "social" rights. Jury service was most commonly understood as a political right, and thus as not covered by the Fourteenth Amendment, but supporters could make a plausible argument that the jury provision was an indirect means of protecting the "civil" right of parties to a lawsuit to have their case tried by a jury that was selected without discrimination on the basis of their race. See Cong. Globe, 42d Cong., 2d Sess. 848 (Feb. 6, 1872) (statement of Sen. Frelinghuysen) ("I do not understand that it is the right of a man to be a juror, but that it is the right of a large class that their whole class shall not be excluded from the jurybox."); see also 3 Cong. Rec. 1794 (Feb. 26, 1875) (statement of Sen. Morton) (arguing that racial discrimination in jury service denies equal protection of the laws).

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The Sumner bill was referred to the Judiciary Committee for a thorough examination of its constitutionality, in light of the recently decided Slaughter-House Cases. n585 Sumner expressed some concern that the Judiciary Committee would kill the bill, as it [*1065] had in earlier Congresses under former chairman Lyman Trumbull, but the new chairman, George Edmunds, assured Sumner that that was not his intention, and Sumner assented to the referral. n586

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n585. 83 U.S. (16 Wall.) 36 (1873); see 2 Cong. Rec. 946 (Jan. 27, 1874) (statement of Sen. Ferry); id. (statement of Sen. Edmunds); id. at 947 (statement of Sen. Stewart).

n586. 2 Cong. Rec. 945-49 (Jan. 27, 1874) (colloquy between Sen. Sumner and Sen. Edmunds).

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The Butler bill was taken up by the House and debated for three weeks. The House debate was extraordinarily partisan and sectional. Fourteen congressmen spoke in favor of the bill. All fourteen were Republicans, two of whom (Lawrence and Poland) had voted in favor of the Fourteenth Amendment. Sixteen congressmen spoke against the bill. All sixteen were Democrats; fourteen were from the

South and none had supported the Fourteenth Amendment. Butler commented scathingly on the lack of Northern support for the opposition:

The only argument which has been introduced here [is] the argument to prejudice.... To show how deep that prejudice is in the South, and that it is not shared by the North, I call the attention of the House that there has yet, in these two days of fruitless debate, been no man from the North who calls himself a democrat who has risen to oppose this bill or make a speech against its provisions. n587

When Butler asked if he was correct, only one Northern Democrat admitted to opposition to the bill. n588

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n587. Id. at 457 (Jan. 7, 1874).

n588. See id. (statement of Rep. DeWitt).

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The principal speaker against the bill was Alexander H. Stephens of Georgia, the Vice President of the Confederate States of America, now eligible to hold office because of the amnesty bill passed by the previous session of Congress. Stephens was considered by many to have been the most eloquent defender of slavery in the later years of the antebellum period. In his famous "Corner-Stone" speech at Savannah, Georgia in March 1861, Stephens had declared that the new Confederate government was based on " "the great truth that the negro is not equal to the white man; that slavery - subordination to the superior race - is his natural and normal condition.' " n589 After the War, Stephens urged acquiescence in the abolition of slavery and good will toward the freedmen, but he opposed both the Fourteenth and Fifteenth Amendments. n590 The [*1066] symbolism of his leadership in the debate was powerful, for it associated opposition to the civil rights bill with the heritage of slavery, the Confederacy, and opposition to the Reconstruction Amendments. His actual constitutional argument was primarily a plea for a very narrow construction of the Section 5 power, arguing that a more expansive construction "would entirely upset the whole fabric of the Government, the maintenance of which in its integrity was the avowed object of the war." n591

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n589. 17 Dictionary of American Biography 573 (Dumas Malone, ed., 1935).

n590. See id. at 574.

n591. 2 Cong. Rec. 380 (Jan. 5, 1874).

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In one of the most compelling moments in the entire debate, Robert Elliott, a black lawyer from South Carolina, rose to respond to Stephens. The descendant of slaves faced the former leader of the slaveholders. Elliott began by

stating that he shared "in the feeling of high personal regard for [Stephens] which pervades this House," referring to Stephens' "years, his ability, and his long experience in public affairs." But, he said, "in this discussion I cannot and I will not forget that the welfare and rights of my whole race in this country are involved." Thus, Elliott did not "shrink from saying that it is not from [Stephens] that the American House of Representatives should take lessons in matters touching human rights or the joint relations of the State and national governments." n592 He continued:

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n592. Id. at 409 (Jan. 6, 1874).

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[Stephens] now offers this Government, which he has done his utmost to destroy, a very poor return for its magnanimous treatment, to come here and seek to continue, by the assertion of doctrines obnoxious to the true principles of our Government, the burdens and oppressions which rest upon five millions of his countrymen who never failed to lift their earnest prayers for the success of this Government when the gentleman was seeking to break up the Union of these States and to blot the American Republic from the galaxy of nations. n593

The Congressional Record reports that Elliott's speech was greeted with loud applause. n594

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n593. Id. at 409-10.

n594. Id. at 410.

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The transcript of the debate leaves the distinct impression that opposition to the bill was not based on a genuine interest in faithful enforcement of the Fourteenth Amendment but was a rearguard [*1067] action by Southern conservatives who had supported slavery, opposed Reconstruction, and now were opposing desegregation on much the same ground. One particularly egregious example bears mention. John Harris of Virginia stated that "there is not one gentleman upon this floor who can honestly say he really believes that the colored man is created his equal." He was interrupted from the floor by Alonzo Ransier, a black congressman from South Carolina, who stated, "I can," to which Harris retorted: "Of course you can; but I am speaking to the white men of the House; and, Mr. Speaker, I do not wish to be interrupted again by him." n595 Shortly thereafter, Harris responded to the argument that Southern sentiments against desegregation were a product of "prejudice":

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n595. Id. at 376 (Jan. 5, 1874) (colloquy between Rep. Harris and Rep. Ransier).

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Mr. HARRIS, of Virginia.... Admit that it is prejudice, yet the fact exists, and you, as members of Congress and legislators, are bound to respect that prejudice. It was born in the children of the South; born in our ancestors, and born in your ancestors in Massachusetts - that the colored man was inferior to the white.

Mr. RANSIER. I deny that.

Mr. HARRIS, of Virginia. I do not allow you to interrupt me. Sit down; I am talking to white men; I am talking to gentlemen. n596

Republicans capitalized on Harris' breach of decorum by implying that it was typical of the "spirit that still animates" the Democratic Party. n597 Representative Elliott responded directly to Representative Harris' "diatribe," stating:

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n596. Id. at 377 (colloquy between Rep. Harris and Rep. Ransier).

n597. Id. at 567 (Jan. 10, 1874) (statement of Rep. Mellish); accord id. at 426 (Jan. 6, 1874) (statement of Rep. Stowell).

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[Harris] so far transcended the limits of decency and propriety as to announce upon this floor that his remarks were addressed to white men alone[.] I shall have no word of reply. Let him feel that a negro was not only too magnanimous to smite him in his weakness, but was even charitable enough to grant him the mercy of his silence. [Laughter and applause on the floor and in the galleries.] n598

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n598. Id. at 410 (Jan. 6, 1874).

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The House debate was ultimately inconclusive. On January 7, 1874, Butler withdrew the bill to the Judiciary Committee to con [*1068] sider various amendments that had been offered on the floor. n599 When it was reported back, it had been stripped of its school desegregation provision. n600 Historian Alfred Kelly attributes Butler's withdrawal of the motion from the floor to pressure from Barnas Sears, an officer of the Peabody Education Fund, which was a principal source of school funding for black and white children in the Southern states, and which threatened to cut off funding if the schools were desegregated. n601 Although this may be true, Butler's statements to the House at the time of recommittal betray no change of heart on the schools issue or

anything else. Butler delivered a fiery speech in full-throated support of the measure, which was interrupted so many times by laughter and applause from the spectators that the Speaker had to threaten to clear the galleries. n602 His only specific reference to the schools question was the sarcastic statement, with regard to an amendment to allow separate but equal schools, that he wished to "consider whether upon the whole it is just to the negro children to put them into mixed [*1069] schools, where, being in the same classes with the white children, they may be kept back by their white confreres." n603 These would not seem to be the remarks of a man who had been persuaded to abandon support for school desegregation.

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n599. Id. at 458 (Jan. 7, 1874). Many of the amendments were directed to the segregation issue, and they confirmed that the bill was understood to outlaw segregated facilities. For example, Rep. Eldredge proposed the following amendment: "That nothing in this act shall be so construed as to prevent any person or corporation from making any separate arrangement or provision for the accommodation, convenience, or comfort of the white citizens of the United States." Id. at 339 (Dec. 19, 1873). Similarly, Rep. Beck proposed:

That nothing herein contained shall be so construed as to require hotel-keepers to put whites and blacks into the same rooms, or beds or feed them at the same table, nor to require that whites and blacks shall be put into the same rooms or classes at school, or the same boxes or seats at theaters, or the same berths on steamboats or other vessels, or the same lots in cemeteries.

Id. at 405 (Jan. 6, 1874). Rep. Durham, a Democrat from Kentucky, also proposed an amendment, which, if adopted, would have authorized the segregation of schools:

Should the trustees or other persons having control over the free or common schools in their respective districts cause to be taught a separate school in said district for the negro and mulatto children therein for the same length of time the other free or common school is taught, then said negroes or mulattoes shall have no right under this bill to admission to or accommodation in schools wherein white children are taught.

Id. at 406. See also id. at 407 (amendment by Rep. Lowndes) (providing "that where separate schools are provided for white and colored children, the children of each race shall have admission only to the schools for that race").

n600. See infra notes 666-69 and accompanying text.

n601. Kelly, supra note 21, at 553-54; see also Frank & Munro, supra note 9, at 466 (concluding that the threat to withdraw school funding "materially contributed to the change in the bill").

n602. See 2 Cong. Rec. 458 (Jan. 7, 1874).

n603. Id. at 457.

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D. Passage by the Senate, 1874

Action on the civil rights bill moved back to the Senate. On April 29, 1874, the Judiciary Committee reported favorably on a revised version of Sumner's bill. n604 In the meantime, Sumner himself had died, so leadership in support of the measure passed to Judiciary Committee member (and future Secretary of State) Frederick Frelinghuysen of New Jersey. Section 1 of the bill as reported from committee was as follows:

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n604. 2 Cong. Rec. 3450-51 (Apr. 29, 1874).

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That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; and also of common schools and public institutions of learning or benevolence supported, in whole or in part, by general taxation; and of cemeteries so supported, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. n605

Section 4 guaranteed the right of every qualified citizen to serve on juries without regard to race, and other sections of the bill specified enforcement and penalties. n606 This proposal - minus the italicized portion respecting schools and cemeteries - ultimately became the Civil Rights Act of 1875.

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n605. Id. at 3451 (Apr. 29, 1874) (emphasis added).

n606. Id.

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Because the Judiciary Committee draft contained language ultimately enacted into law, we must pause to consider whether it required access to the covered facilities on a desegregated basis, or merely on a separate-but-equal basis. In the years following enactment, several lower federal courts interpreted the Act to permit separate but equal facilities, albeit without reference to (and likely [*1070] without access to) the legislative history. n607 Furthermore, historians have expressed doubt about the Act's intended meaning. n608

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n607. See, e.g., Charge to Grand Jury - The Civil Rights Act, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875) (No. 18,258); United States v. Dodge, 25 F. Cas. 882,

883 (W.D. Tex. 1877) (No. 14,976); see also Gray v. Cincinnati S. Ry. Co., 11 F. 683, 685-86 (C.C.S.D. Ohio 1882) (noting in dictum that the obligation to provide equal accommodations may sanction segregation).

n608. See, e.g., Lofgren, supra note 9, at 137 ("As adopted, the equal accommodations section [of the 1875 Act] may have guaranteed more than simply a right of access to equally good facilities, enforceable in federal court, but this interpretation was ensured neither by its language nor by its legislative history."). Herbert Hovenkamp has stated:

The Civil War Amendments and the Civil Rights Act of 1875 were designed to give blacks "equal" access to certain institutions and facilities - but in 1875 equal access did not mean integrated access.... In fact, the outcome in Plessy v. Ferguson would have been the same even if the Civil Rights Act of 1875 had been upheld by the Supreme Court.

Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 Duke L.J. 624, 642-43. Neither Lofgren nor Hovenkamp analyzed the legislative history in any detail, and they did not present any evidence in support of their reading of the Act that is not analyzed in this Article.

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Frelinghuysen explained that his bill "followed the language of the original bill as introduced by Mr. Sumner," changed only "in the manner in which it is presented." n609 This would, of course, mean that the bill forbade segregation of the covered facilities, because this was the clear import of Sumner's bill. But in fact the committee had subtly altered Sumner's language to reflect the revisionist equal protection rationale for the bill, as a response to the Slaughter-House decision. n610 Whereas the Sumner bill had begun with the words "no citizen of the United States shall," the Frelinghuysen bill applied to "all persons within the jurisdiction of the United States." n611 This revision reflected the doctrinal shift from the Privileges or Immunities Clause to the Equal Protection Clause. Moreover, in shifting from a negative proscription ("no citizen of the United States shall") to an affirmative protection ("all persons within the jurisdiction of the United States shall"), the committee had to drop the word "any" that had appeared in Sumner's text. Where Sumner's bill had provided that no citizen shall be "excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished [*1071] by ... superintendents, teachers, and other officers of common schools," the revised bill provided that all persons "shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of ... common schools." n612 The right to equal accommodation in any school is not necessarily the same as the right to equal accommodation in the schools. The change thus introduced an ambiguity that had not been present in the Sumner bill. In light of Frelinghuysen's explanation, the ambiguity was apparently both unnoticed and unintended, but it nonetheless generated questions.

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n609. 2 Cong. Rec. 4169 (May 22, 1874). Sumner's bill is quoted in full at supra note 582.

n610. 83 U.S. (16 Wall.) 36 (1873).

n611. Compare 2 Cong. Rec. 945 (Jan. 27, 1874) (Sumner bill) with id. at 3451 (Apr. 29, 1874) (Frelinghuysen bill).

n612. Compare id. at 945 (Jan. 27, 1874) (Sumner bill) (emphasis added) with id. at 3451 (Apr. 29, 1874) (Frelinghuysen bill).

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George Boutwell of Massachusetts, a dedicated proponent of racially integrated schools and former member of the Joint Committee on Reconstruction, perceived that omission of the word "any" could obscure the meaning of the bill:

There are Senators who say, and there are persons outside who will say, ... that if a school-house is set up on one side of a street for black children and another on the opposite side set up for white children and they are compelled respectively to go to the schools established, and it turns out that the appropriation made for each school is equal to the appropriation made for the other, that the teachers are of equal capacity, that the same branches are taught, then equal facilities are furnished, which is the expression employed by the committee. n613

He therefore moved to amend the bill to refer to "every common school and public institution of learning or benevolence." n614 Boutwell explained that his amendment was purely for purposes of clarification: "I only wish to say that this amendment is designed to make clearer than the text of the bill seems to do what I suppose is the intention of the committee, and the intention of the Senate ...." n615

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n613. Id. at 4168 (May 22, 1874).

n614. Id. at 4167 (emphasis added).

n615. Id.

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Others did not see the ambiguity, and suspected that Boutwell's intention was to require the states to compel attendance at racially [*1072] integrated schools. n616 Frelinghuysen insisted that under the bill as reported by the committee "a colored child has a right to go to a white school, or a white child to go to a colored school," n617 and thus that Boutwell's amendment was unnecessary. He pointed out that Boutwell's amendment, in addition to being unnecessary, would literally mean that "all persons shall be entitled to the accommodations of every common school," which would make no sense, because no child could attend more than one school at a time. n618 He also reminded the Senate (inaccurately) that the language had been taken from Sumner's legislation, which should have assured them that it could not reasonably be interpreted to allow separate but equal schools. The principal spokesman for

the opposition, Senator Allen Thurman, former Chief Justice of the Ohio Supreme Court, similarly interpreted the bill as requiring desegregation. "I know that the first section of the bill may to a careless reader seem ambiguous," he commented, "but I do not think there is one member of the majority of the Judiciary Committee who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools." n619 A number of other congressmen in both houses likewise commented that though the text was ambiguous the intent was clear. n620 An [*1073] identical ambiguity in a law prohibiting discrimination by a railroad had been interpreted by a unanimous Supreme Court the previous year as forbidding segregation. n621 Boutwell's amendment was defeated by a vote of 5-42. n622

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n616. See id. at 4168 (statement of Sen. Stewart) (stating that Boutwell's amendment would "require the children of colored people and white people to go to the same school, whether they desire it or not"); id. (colloquy between Sen. Frelinghuysen and Sen. Boutwell).

n617. 2 Cong. Rec. 4168 (May 22, 1874); accord id. (statement of Sen. Frelinghuysen) (stating that "the bill as it stands ... does give any person a right to any of these schools") (emphasis added).

n618. Id. (emphasis added). Frelinghuysen also pointed out that other language in Boutwell's amendment would make the bill applicable to private schools that received any form of state "endowment" in the future. He stated that "I do not think we ought to put it in the power of a State by making an endowment to an institution to change it from a private to a public institution." Id. This position accords with the Supreme Court's later holdings that the mere receipt of governmental financial assistance by a private institution does not render its actions "state action" for purposes of the Fourteenth Amendment. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982). But cf. Norwood v. Harrison, 413 U.S. 455, 463-68 (1973) (striking down state provision of textbooks to racially discriminatory private schools in context of state-encouraged movement to abandon public schools).

n619. 2 Cong. Rec. 4088 (May 20, 1874).

n620. See, e.g., 3 Cong. Rec. 981 (Feb. 4, 1875) (statement of Rep. Ellis Roberts) (stating that he "understands the Senate bill to insist upon the same schools for the colored children as for the white children"); 2 Cong. Rec. 4158 (May 22, 1874) (statement of Sen. Saulsbury) (stating that, despite Boutwell's comments, he interprets the bill as prohibiting separate schools); id. at 4154 (statement of Sen. Cooper) (noting that the text of the bill is ambiguous but that the intent is clear).

n621. Railroad Co. v. Brown, 84 U.S. (17 Wall.) 445, 452-53 (1873). For fuller discussion of the case, see infra text accompanying notes 792-805.

n622. 2 Cong. Rec. 4169 (May 22, 1874).

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Subsequent debate further confirms that the bill was understood to require not just equality of facilities but desegregation, for that was the

predominant focus of the senators' remarks. Far more than in earlier debates, opponents pressed the argument that separate facilities of equal quality would suffice to satisfy the dictates of the Constitution. n623 Perhaps the clearest statement of this argument was by Augustus Merrimon, a North Carolina Democrat, who reasoned:

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n623. See, e.g., id. at 4144 (statement of Sen. Stockton); id. at 4154-55 (statement of Sen. Cooper); id. at 4158 (statement of Sen. Saulsbury); id. at 4167 (statement of Sen. Stewart); id. app. at 321 (statement of Sen. Bogy); id. at 368 (statement of Sen. Hamilton); id. at 359, 360 (May 21, 1874) (statements of Sen. Merrimon).

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The State Legislature cannot pass a law providing that white children should be educated and that colored children should not be, because that would deny the equal protection of the laws. But when it affords the same provision, the same measure, the same character for the colored race that it afforded for the white race, there is no more discrimination against one race than there is against the other; and therefore it is competent for the Legislature to do it, there being no restriction on such a power in the Constitution of the United States. n624

On the proponents' side, Edmunds denounced a proposed amendment that would authorize separate facilities: "If there is anything in the bill," he said, "it is exactly contrary to that. If there is anything in the fourteenth amendment it is exactly opposite to that." n625

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n624. 2 Cong. Rec. app. at 359 (May 21, 1874).

n625. 2 Cong. Rec. 4171 (May 22, 1874).

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To be sure, Republican supporters of the bill not infrequently denied that it would bring about "mixed schools," which has led some historians to question whether these speakers understood it [*1074] to require desegregation. n626 In context, however, these comments had an entirely different meaning. Supporters of the bill were divided into two camps, which we might call (using modern terminology) "desegregationists" and "integrationists." Desegregationists, the larger group, maintained that all children should have the right to attend any public school without discrimination on the basis of their race, but that individuals of both races could (and probably would) choose to attend separate schools. Frelinghuysen explained that "when in a school district there are two schools, and the white children choose to go to one and the colored to the other, there is nothing in this bill that prevents their doing so." n627 He predicted that "this voluntary division into separate schools would often be the solution of difficulty in communities where there still lingers a prejudice against a colored boy." n628 Separate schools, however, would be confined to those localities in which a large number of black

children resided, and where sentiment in favor of separation was strong enough among both races to make it practical. n629

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n626. See Lofgren, supra note 9, at 137.

n627. 2 Cong. Rec. 3452 (Apr. 29, 1874).

n628. Id.; accord id. at 4082 (May 20, 1874) (statement of Sen. Pratt) ("Where the colored people are numerous enough to have separate schools of their own, they would probably prefer their children should be educated by themselves, and there is nothing in this bill which prohibits this."). Similarly, Sen. Alcorn stated:

Every child in [Mississippi] has the benefit of a common-school education, we have no prohibition declared. You have a right to send your child to any school you choose. That is the citizen's right; but it is simply a right that the colored people exercise by sending their children to the colored school; it is a right that the white people enjoy by sending their children to the white school.

Id. app. at 305 (May 22, 1874).

n629. See 2 Cong. Rec. 4082 (May 20, 1874) (statement of Sen. Pratt).

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The issue of principle, according to the desegregationists, was equality of rights before the law rather than the actual pedagogical or moral consequences of mixed schooling. Senator Edmunds called desegregated schools "a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens." n630 Representative John Lynch, a black Republican from Mississippi, put the point in this way:

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n630. Cong. Globe, 42d Cong., 2d Sess. 3260 (May 9, 1872).

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The colored people in asking the passage of this bill just as it passed the Senate do not thereby admit that their children can be [*1075] better educated in white than in colored schools; nor that white teachers because they are white are better qualified to teach than colored ones. But they recognize the fact that the distinction when made and tolerated by law is an unjust and odious proscription; that you make their color a ground of objection, and consequently a crime. This is what we most earnestly protest against. Let us confer upon all citizens, then, the rights to which they are entitled under the Constitution; and then if they choose to have their children educated in separate schools, as they do in my own State, then both races will be satisfied, because they will know that the separation is their own voluntary act and not legislative compulsion. n631

In an earlier debate, Senator Hiram Revels, a black Republican from Mississippi, predicted that black children would be "very slow" about actually attending white schools. But, he said, laws requiring racial separation "increase that prejudice which is now fearfully great against them.... I repeat, let no encouragement be given to a prejudice against those who have done nothing to justify it." n632

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n631. 3 Cong. Rec. 945 (Feb. 3, 1875).

n632. Cong. Globe, 41st Cong., 3d Sess. 1059 (Feb. 8, 1871).

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A much smaller group, led by Senator Boutwell of Massachusetts, stressed that the goal should be actual integration:

To say ... that equal facilities shall be given in different schools, is to rob your system of public instruction of that quality by which our people, without regard to race or color, shall be assimilated in ideas, personal, political, and public, so that when they arrive at the period of manhood they shall act together upon public questions with ideas formed under the same influences and directed to the same general results n633

He explained that the "theory of human equality cannot be taught in families," but that "in the public school, where children of all classes and conditions are brought together, this doctrine of human equality can be taught, and it is the chief means of securing the perpetuity of republican institutions." n634

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n633. 2 Cong. Rec. 4116 (May 21, 1874).

n634. Id.

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Both camps clearly agreed, however, that the bill would and should give all schoolchildren a legally enforceable remedy if they [*1076] were excluded from any school on the basis of race - the very issue that would later reach the Supreme Court in Brown v. Board of Education. n635 Senator Timothy Howe of Wisconsin, for example, disputed Boutwell's contention that the public schools should be used to "unteach this [racial] prejudice" and insisted that voluntary separation of the races was both likely and desirable. n636 At the same time, however, he stressed that the choice must be left to "individuals and not the superintendent of schools" and that the "law" should not be allowed to "say that they shall not be educated together." n637

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n635. 347 U.S. 483 (1954).

n636. 2 Cong. Rec. 4151 (May 22, 1874).

n637. Id.

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The difference between these camps has a modern analogue in controversies that arose in the decades after Brown. In the fields of higher education and noncompulsory educational activities, the Supreme Court has held that there is no constitutional obligation to require actual integration, provided the facilities are equal and open to students of all races and the state maintains no policies that perpetuate segregation. n638 But in the context of primary and secondary education, the Court has held that voluntary choice programs are constitutionally inadequate and that previously segregated school districts must take affirmative steps to integrate their student bodies, by race-conscious student assignment and transportation if necessary. n639 The latter position goes farther than even Boutwell thought he could go:

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n638. See United States v. Fordice, 112 S. Ct. 2727 (1992) (higher education); Bazemore v. Friday, 478 U.S. 385 (1986) (extracurricular activities). In Fordice, the Court recognized that merely because "an institution is predominantly white or black does not in itself make out a constitutional violation," but held that "because the former de jure segregated system of public universities in Mississippi impeded the free choice of prospective students, the State in dismantling that system must take the necessary steps to ensure that this choice now is truly free." Fordice, 112 S. Ct. at 2743; see also id. at 2744 (Thomas, J., concurring) (stating that the Court's decision "portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions").

n639. See Green v. County Sch. Bd., 391 U.S. 430, 437-42 (1968); see also Freeman v. Pitts, 112 S. Ct. 1430, 1443 (1992) (citing Green for the proposition that former de jure segregated school districts must enact affirmative desegregation measures designed to create "a unitary system in which racial discrimination would be eliminated root and branch").

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[*1077]

Mr. FRELINGHUYSEN. I wish to ask the Senator from Massachusetts a question. I ask whether he proposes by his amendment to compel colored children to go to white schools?

Mr. BOUTWELL. That I cannot do; but I will do everything which the Constitution authorizes to be done - to see to it that the children are trained together for purpose of life, and education is the fitting for it.

Mr. FRELINGHUYSEN. You do not propose to compel them?

Mr. BOUTWELL. I do not contemplate that. I cannot do that. n640

When supporters of the bill denied that it would necessarily require "mixed schools," then, they did not mean that it would countenance de jure segregation. They meant only that genuine freedom-of-choice plans would be permissible and that compulsory integration was unnecessary.

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n640. 2 Cong. Rec. 4168 (May 22, 1874).

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The choice between desegregation and separate but equal was squarely presented. Again amendments were proposed that reflected each of the two principal constitutional claims of the opposition: that education is not a protected civil right and that segregated schools are "equal." Senator Aaron Sargent, a Republican from California, proposed to amend the bill to provide:

That nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such separate schools are equal in all respects to others of the same grade established by such authority, and supported by an equal pro rata expenditure of school funds. n641

The amendment failed by a vote of 21-26. n642 All the negative votes were from Republicans. Of the senators who had voted for the Fourteenth Amendment in the Thirty-ninth Congress, eight voted against the amendment and two voted in favor. n643 One of the two exceptions, William Stewart of Nevada, later voted for the bill.

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n641. Id. at 4167.

n642. Id.

n643. Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with 2 Cong. Rec. 4167 (May 22, 1874) (reporting the Senate vote on the Sargent amendment).

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[*1078]

John Gordon, Democrat from Georgia, suggested striking the entire school clause, but this motion was defeated, 14-30. n644 Another amendment, to exclude already established schools, garnered only 11 votes. n645 Sargent then proposed another version of his separate-but-equal amendment, in somewhat more ambiguous language. n646 This time he lost, 16-28. n647 A motion to delete the jury clause was also defeated, 15-28. n648

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n644. 2 Cong. Rec. 4170 (May 22, 1874).

n645. Id. at 4171.

n646. Id. Sargent's amendment would have guaranteed each schoolchild the right to the equal benefit and enjoyment "of the common-school system." Id. (statement of Sen. Sargent). This proposal was immediately recognized as "authorizing States on account of color to deny the right to ... go to a particular common school." Id. (statement of Sen. Edmunds).

n647. Id. at 4175.

n648. Id.

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The meaning of the bill having been clarified, its constitutionality thoroughly debated, and attempts to amend it to allow separate but equal school laws defeated, the civil rights act came up for a final vote on May 22, 1874. It passed by a margin of 29-16. n649 Only four members of the Senate who had voted for the Fourteenth Amendment as members of the Thirty-ninth Congress were present for the vote; all four voted in favor of the bill. n650 It carried among the Republican senators by a margin of 23-3. Senators Boreman, Carpenter, and Lewis were the only Republicans to vote against. n651

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n649. Id. at 4176.

n650. Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with 2 Cong. Rec. 4176 (May 22, 1874) (reporting the Senate vote on passage of the civil rights act).

n651. 2 Cong. Rec. 4176 (May 22, 1874).

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E. Failure in the House, 1874

The Senate bill now went to the House, where under House rules it could not be reported by the Judiciary Committee that session without a motion to suspend the rules, which required a two-thirds majority. House support for the bill must therefore be measured by the results of a series of procedural votes. Three times General Butler moved to suspend the rules to allow the Committee to consider and report the bill. On May 25, just three days after the bill had passed the Senate, he garnered 152 votes, with 85 vot [*1079] ing "nay." n652 That is a very substantial majority, but less than two-thirds. One week later, on June 1, he tried again. This time, he reported that he had been "instructed by the Committee on the Judiciary to allow a motion in the House to strike out the school clause of that bill." n653 Upon questioning, however, he refused to agree to support striking out the clause, but only to allow a vote. n654

Apparently, the Democrats were not confident that they could prevail on such a vote without an agreement in advance, so they did not accept Butler's offer and instead attempted to run out the clock by a series of procedural votes. The key vote that day was on a motion to adjourn, which failed by a margin of 72-141. n655 If this vote was a proxy for the merits, as it appears to have been, n656 the shift of a single vote would have produced Butler's necessary two-thirds, and the Sumner bill would have been assured of passage. As a Southern Republican opponent of the bill commented later: "The majority of this House, yea nearly two-thirds, in June last solemnly voted that they would not only take up but they would pass the civil-rights bill as it came from the Senate." n657 But Butler could not capitalize on this support that day; the time came for recess and the House moved on to other business. n658 He tried again on June 8, this time summoning a margin of 138-88, far short of the necessary two-thirds. n659 On June 18, Butler announced that he had concluded that the bill could not get the necessary two-thirds, a conclusion that was disputed by his political ally, George Hoar. n660 Butler then asked for unanimous consent to refer the bill to the Committee on the understanding that it would not be reported out in that session. n661

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n652. Id. at 4242-43 (May 25, 1874).

n653. Id. at 4439 (June 1, 1874).

n654. Id. Alfred Kelly's claim that Butler "promised the House to strike out the mixed school clause" is not accurate. See Kelly, supra note 21, at 555 n.97.

n655. 2 Cong. Rec. 4439 (June 1, 1874).

n656. With only six exceptions (which split evenly in the two directions), every negative vote on the motion to adjourn supported Butler's position on the motions to suspend the rules, and every affirmative vote opposed.

n657. 3 Cong. Rec. 978 (Feb. 4, 1875) (statement of Rep. Sener).

n658. 2 Cong. Rec. 4439 (June 1, 1874).

n659. Id. at 4691 (June 8, 1874).

n660. Id. at 5162-63 (June 18, 1874).

n661. Id.

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[*1080]

F. The Elections of 1874, Deletion of the Schools Provision, andPassage of theAct

The events of May and June represented the high point of support for school desegregation legislation. The congressional elections of November 1874 were a

disaster for the Republican Party, which lost eighty-nine seats in the House. n662 Even General Butler lost his seat in the landslide. From holding less than a third of the House seats in the Forty-third Congress, the Democrats achieved a majority of sixty seats in the Forty-fourth. n663 Civil rights was the principal issue in the campaign, though corruption and recession played a major role. n664 When the lameduck Forty-third Congress convened in December, the leadership of the civil rights bill was demoralized. Democrats claimed a mandate against the bill. n665 The House Judiciary Committee broke into internal dissent, requiring more than 20 votes to reach a conclusion about the bill. n666 Eventually, the committee reported a bill that required desegregation of inns, common carriers, and other public accommodations, but permitted "separate schools and institutions giving equal educational advantages in all respects for different classes of persons entitled to attend such schools." n667 Even that was denounced by Democrats as "defiance of the clear, distinct, and overwhelming verdict of the people at the elections." n668 While lameduck Republicans continued to support the measure, those who would have to face the voters again in 1876 deserted the cause in droves. Republican Simeon Chittenden, of New York, frankly admitted that he was going to vote against the bill despite its "justice" and its "conformity ... with the late constitutional amendments" because "I do [*1081] not want to go down with my party quite so deep as the bill will sink it if it becomes the law." n669

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n662. See Gillette, supra note 18, at 246.

n663. See id.

n664. For a detailed account of the election, see id. at 211-58.

n665. See, e.g., 3 Cong. Rec. app. at 17 (Feb. 4, 1875) (statement of Rep. A. White); 3 Cong. Rec. 1001 (Feb. 4, 1875) (statement of Rep. Phelps); id. at 949 (Feb. 3, 1875) (statement of Rep. Finck); id. at 951 (statement of Rep. Storm); id. at 952 (statement of Rep. Whitehead); accord id. at 978-79 (statement of Rep. Sener). But see id. at 1005 (Feb. 4, 1875) (statement of Rep. Garfield) ("The recent disasters of the republican party have not sprung from any of the brave acts done in the effort to do justice to the negro.").

n666. Kelly, supra note 21, at 558 n.113.

n667. 3 Cong. Rec. 939 (Feb. 3, 1875).

n668. Id. at 949 (Feb. 3, 1875) (statement of Rep. Finck).

n669. Id. at 982 (Feb. 4, 1875).

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Deliberations on the civil rights bill began on Wednesday, January 27, 1875. Opponents of the bill embarked on a ferocious filibuster, with repeated roll call votes on various motions to adjourn, all of them soundly defeated only to be made again. n670 The House remained in continuous session until Friday morning, and marshals were dispatched to summon weary members from their homes to maintain a quorum. Eventually, after some 48 hours of monotonous parliamentary maneuvering, proponents of the bill gave up and the House

adjourned. n671

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n670. See id. at 785-829 (Jan. 27, 1875).

n671. Id. at 829.

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The time had come to change the rules. On January 23, the Republican caucus had proposed a rule that henceforth, a majority vote would suffice to suspend the rules to bring business to the floor. Members of the majority party thought it intolerable that a minority of one-third plus one could tie up legislative business indefinitely. The civil rights filibuster clinched support for the change. After heated and tumultuous debate, and compromise revision to guarantee the minority reasonable time for legislative deliberation, the rules were amended to empower a majority to act. n672 The abolition of the filibuster in the House remains the most enduring legacy of the struggle over the 1875 Act.

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n672. The rules change debate is described in Gillette, supra note 18, at 266-69.

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On February 3, the House took up the bill under the revised rules. As reported by the Judiciary Committee, the bill applied to schools, but expressly permitted the schools to be separate but equal. Other facilities covered by the Act would be desegregated. By prearrangement, the Judiciary Committee permitted votes to be taken on three amendments to the bill. n673 The first, by Representative Cessna of Pennsylvania, would restore the language of the Senate bill and thus forbid segregated schools. n674 The second, by [*1082] Representative White of Alabama, would permit separate accommodations in all the facilities and institutions covered by the Act. n675 The third, by Representative Kellogg of Connecticut, would strike out the entire schools provision but leave the public accommodation provisions intact. n676

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n673. See 3 Cong. Rec. 938 (Feb. 3, 1875) (statement of Rep. Butler) (explaining that this procedure had been adopted "in order that all shades of republican opinion may be voted upon").

n674. See id. (statement of Rep. Cessna). The Cessna substitute, according to its author, "is not only substantially, but it is without any alteration, the bill as finally passed by the Senate." Id.

n675. See id. at 939. The White substitute followed the language of the Senate bill, including "common schools and public institutions of learning or benevolence supported in whole or in part by general taxation," but added a proviso:

Provided, That nothing in this act shall be construed to require mixed

accommodations, (by sitting together,) facilities, and privileges at inns, in public conveyances on land or water, theaters, or other places of public amusement, for persons of different race or color, nor to prohibit separate accommodations, facilities, and privileges at inns, in public conveyances on land or water, theaters, or other places of public amusement; such separate accommodations, facilities, and privileges being equal in equipment and kind for persons of every race and color, regardless of any previous condition of servitude: And provided further, That nothing in this act shall be construed to require mixed common schools and public institutions of learning and benevolence for persons of different race or color, nor to prohibit separate common schools for different races or colors, provided the facilities, duration of term, and equipments of such common schools and public institutions for both races in the town, city, school district, or other topographical division shall be equal in facilities and equipments for both races for the purposes for which such institutions are established.

Id.

n676. See id.

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There ensued two days of acrimonious debate, during which John Y. Brown of Kentucky was censured n677 for his description of General Butler as

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n677. Id. at 992 (Feb. 4, 1875).

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one who is outlawed in his own home from respectable society; whose name is synonymous with falsehood; who is the champion, and has been on all occasions, of fraud; who is the apologist of thieves; who is such a prodigy of vice and meannesses that to describe him would sicken imagination and exhaust invective. n678

That set the tone.

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n678. Id. at 985. Brown also stated that "if I wished to describe all that was pusillanimous in war, inhuman in peace, forbidden in morals, and infamous in politics, I should call it 'Butlerism.' " Id.

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When time came to vote, Kellogg's amendment striking the school clause passed, 128-48. n679 White's amendment allowing separate but equal facilities for all the institutions covered by the Act [*1083] failed, 91-114. n680 Cessna's motion to restore the school desegregation provision by adopting the language of the Senate bill then failed, 114-148. n681 All 114 members who voted for the Cessna amendment were Republicans. Fear of political fallout seems to

be the reason for the decline in Republican support, as compared to the previous year. Among lameduck Republicans, who would not have to face the voters again, the Cessna amendment carried by a margin of 73-10. Among those who had been reelected the amendment failed by a margin of 41-53. This defeat was the first time a significant number of Republicans failed to support school desegregation in the House. All of the Democrats voted "nay." The final bill, shorn of the schools provision, then passed the House by a vote of 162-99. n682 Again, all affirmative votes were from Republicans.

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n679. Id. at 1010.

n680. Id.

n681. Id. at 1010-11.

n682. Id. at 1011. Historian Charles Lofgren speculates that the 1875 Act passed the House of Representatives only because "many House Republicans found themselves lame ducks after the autumn election of 1874, and hence unencumbered by worries about constituents who cared little for civil rights." Lofgren, supra note 9, at 137. This interpretation is not borne out by the facts. The Act won the support not only of almost all the lameduck Republicans, but of 48 out of 60 (80%) of the Republicans who had been reelected. (A larger number of reelected Republicans abandoned school desegregation, the most controversial feature of the bill, by voting against the Cessna amendment; but they voted for the final Act.) More to the point, every lameduck Republican who voted in favor of the 1875 Act, without a single exception, had voted the previous May to suspend the rules to take up and pass the bill. Compare 2 Cong. Rec. 4242-43 (May 25, 1874) (reporting the House vote on the motion to suspend the rules) with 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on passage of the Civil Rights Act of 1875). Lofgren does not explain why, if they were trying to avoid offending their constituents, large majorities of the House Republicans voted over and over again to bring the measure to the floor before the election. Contrary to Lofgren, the 1874 elections diminished support for the bill among Republicans who had been reelected; it did not increase support among the lame ducks.

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These votes require explanation. Advocates of school desegregation realized that they no longer had the votes to pass their desired legislation, even by a simple majority. They were thus faced with a choice between a civil rights bill with an explicit authorization for separate but equal schools and a bill that did not apply to schools whatsoever. With some exceptions, they concluded that a separate-but-equal provision was worse than no provision at all. Many supporters of school desegregation therefore [*1084] voted in favor of the Kellogg amendment, as well as the Cessna amendment. n683 Kellogg, who had supported school desegregation in each of the previous efforts, stated that he offered his motion because the separate-but-equal provision was "worse than nothing." n684 "As the bill is now drawn," he explained, "we recognize a distinction in color which we ought not to recognize by any legislation of the Congress of the United States." n685 James Monroe, an Ohio Republican, explained that he preferred the Senate bill but would vote for the Kellogg amendment because the committee bill "introduces formally into the statute law a discrimination between different classes of citizens in regard to their privileges as citizens." n686 This he

regarded as "a dangerous precedent": "If we once establish a discrimination of this kind we know not where it will end." n687 Richard Cain, a black Republican from South Carolina, stated: "If the school clause is objectionable to our friends, and they think they cannot sustain it, then let it be struck out entirely. We want no invidious discrimination in the laws of this country." n688 Julius Burrows, a Michigan Republican, made a passionate plea for restoring the Sumner bill - for what he called "free schools." But he stated that "if you cannot legislate free schools, I prefer that the bill should be altogether silent upon the question until other times and other men can do the subject justice." n689 If the separate-but-equal compromise were enacted, he predicted, "its pernicious influence would be felt in every State and Territory." n690 Butler agreed. n691 Even at the end, then, when the Repub [*1085] licans no longer had the votes to enact a school desegregation bill, they refused to admit the legitimacy of the separate-but-equal principle, and they were able to block it from enactment.

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n683. One hundred-fourteen members supported the Cessna amendment, 3 Cong. Rec. 1011 (Feb. 4, 1875), and only 48 opposed the Kellogg amendment. Id. at 1010. Even assuming none of the opponents of the Kellogg amendment were opponents of desegregation (which is unlikely), a majority of the desegregation faction supported Kellogg's motion. It is necessary to rely on inference here, because the yeas and nays on Kellogg's motion were not recorded.

n684. Id. at 981.

n685. Id. at 997. Kellogg also expressed concern that desegregation would "destroy the schools in many of the Southern States." Id.

n686. Id.

n687. Id.

n688. Id. at 981.

n689. Id. at 1000.

n690. Id.

n691. Id. at 1006 (statement of Rep. Butler) (stating that "I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools").

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Four members of the House who had voted against the Fourteenth Amendment in 1866 remained; and all four voted against the Civil Rights Act, n692 as well as against including school desegregation in the final bill. n693 Fourteen members of the House who had voted in favor of the Fourteenth Amendment (in one case as a Senator) remained. Ten voted in favor of including school desegregation in the bill and in favor of the bill. n694 The other four (one of whom had forgotten how he voted and now declared himself to have "opposed the fourteenth amendment by my vote and by my voice" n695) voted against including school desegregation but in favor of the final bill. n696 Three of these four had voted in favor of

school desegregation before the election, n697 but they had abandoned the cause.

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n692. Compare Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866) (reporting the House vote on passage of the Fourteenth Amendment) with 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on passage of the civil rights bill). Representatives Eldredge, Finck, Niblack and Randall opposed both measures.

n693. 3 Cong. Rec. 1011 (Feb. 4, 1875). This statement is based on their votes on the Cessna amendment. Unfortunately, the yeas and nays on the Kellogg amendment were not recorded.

n694. Compare Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866) (reporting the House vote on passage of the Fourteenth Amendment) with 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on the Cessna amendment to require school desegregation) and id. (reporting the House vote on passage of the civil rights bill). Representatives Dawes, Garfield, Hooper, Kasson, Kelley, Lawrence, Myers, O'Neill, Orth and Sawyer supported all three measures.

n695. 3 Cong. Rec. 979 (Feb. 4, 1875) (statement of Rep. Hale). This was Robert S. Hale of New York. In actuality, while Hale spoke against the Amendment, he was absent for the first vote approving the Amendment, see Cong. Globe, 39th Cong., 1st Sess. 2545 (May 10, 1866), and voted in favor on the second vote. See id. at 3149 (June 13, 1866). Because Hale made a point of associating his vote against the bill with his recollected opposition to the Amendment, his vote might more accurately be deemed the vote of an opponent.

n696. Compare 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on the Cessna amendment to require school desegregation) with id. (reporting the House vote on passage of the civil rights bill). Representatives Bundy, Poland and Scofield opposed school desegregation but supported the final bill.

n697. All three had voted to suspend the rules to take up the Senate civil rights bill. See 2 Cong. Rec. 4242 (May 25, 1874). On June 1, Poland and Bundy voted against the motion to adjourn; Scofield was not present. Id. at 4439. Poland and Scofield voted against rejecting the Frye bill; Bundy was not a member of the House at that time.

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[*1086]

Support for the Kellogg amendment did not mean that desegregation proponents had lost faith in their constitutional position, only that they had concluded that litigation would be a more promising avenue for achieving those principles. Representative Monroe reported that he had consulted upon this subject with "influential colored gentlemen who are recognized as representative men of their people," as well as with Republicans "known as men of radical opinions." n698 According to these informants, Monroe told the House that:

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n698. 3 Cong. Rec. 997 (Feb. 4, 1875).

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[Blacks] would rather have their people take their chances under the Constitution and its amendments; that they would rather fall back upon the original principles of constitutional law and take refuge under their shadow than to begin with this poor attempt to confer upon them the privileges of education connected with this discrimination. n699

On this point Monroe was questioned by a fellow supporter of the bill:

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n699. Id.

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Mr. MERRIAM. Does the gentleman from Ohio [Mr. Monroe] wish the country to understand that in his opinion it would be more satisfactory to the colored people of the South to have freedom of the theaters and of the cemeteries rather than freedom of schools?

Mr. MONROE. They think their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this. n700

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n700. Id. at 998.

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The House bill returned to the Senate, where the political will of the previous desegregation majority had similarly dissipated with the election. No attempt was made to restore the schools clause, and the bill passed the Senate without amendment on February 27, 1875, one month before the Democratic majority would take over. n701 President Grant signed the bill on March 1. n702

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n701. Id. at 1870 (Feb. 27, 1875).

n702. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

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[*1087]

G. Epilogue: Judicial Invalidation (1883) and Congressional Failure(1884)

Between 1875 and 1877, blacks in both the North and the South attempted to avail themselves of the protections of the bill, but resistance was strong. n703 Some proprietors closed down their facilities in protest, some converted from being licensed public accommodations to being private clubs or boardinghouses, and many more simply refused to comply, often enforcing their will with violence against the would-be black patrons. n704 Tennessee went so far as to pass a statute in 1875 abrogating the common law duty of innkeepers, common carriers, and proprietors of public amusements to serve all persons, making their management's control over who would use the services as "perfect and complete" as that "of any private person over his private house, carriage, or private theatre, or places of amusement for his family." n705 This reflected the legislature's correct understanding that the constitutional basis for the public accommodation and common carrier provisions of the Civil Rights Act was the failure of states to accord the same rights to black citizens as they did to whites. If Tennessee did not enforce common carrier rights for the benefit of whites, there was no constitutional basis for application of the 1875 Act in that state.

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n703. For a detailed account of the enforcement experience under the Act, see John Hope Franklin, The Enforcement of the Civil Rights Act of 1875, 6 Prologue 225 (1974); see also Gillette, supra note 18, at 276-78 (detailing the futility of enforcement efforts under the 1875 Act).

n704. See Franklin, supra note 703, at 226-27; see also Gillette, supra note 18, at 276-77 (reciting Southern efforts to circumvent the Act).

n705. Act of Mar. 24, 1875, ch. 130, 1, 1875 Tenn. Acts 216, 216-17. This statute was held unconstitutional as applied to interstate travel in Brown v. Memphis & C. Ry. Co., 5 F. 499, 501 (C.C.W.D. Tenn. 1880).

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Some black plaintiffs obtained legal redress for exclusion from segregated facilities. n706 More often their efforts were frustrated. For many months, the Department of Justice failed to provide copies of the law to U.S. Attorneys and others in the field, leaving [*1088] them ignorant of its content. Even after supplying the text of the Act, the Department refused to provide interpretive guidance. n707 The true import of the law, as reflected in its legislative history, was therefore obscured. Many lower federal courts interpreted the Act narrowly, either ruling that various facilities (such as barber shops, saloons, or ice cream parlors) were not covered n708 or that separate but equal facilities were sufficient. n709 And most of all, enforcement of the Act was plagued by doubts about its constitutionality. Lower courts were sharply divided on the question. After 1877, the lower courts decided few cases under the Act; presumably they were awaiting a decision by the Supreme Court on the fundamental question of whether the Act was constitutional. n710

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n706. See, e.g., Gray v. Cincinnati S. Ry. Co., 11 F. 683, 686 (C.C.S.D. Ohio 1882) (charging jury that defendant railroad company was liable under the Civil Rights Act if it denied plaintiff seating in the ladies' car because of her color); United States v. Newcomer, 27 F. Cas. 127, 128 (E.D. Pa. 1876) (No. 15,868) (charging jury that a hotel keeper who had denied a traveler lodging because of his color violated the Civil Rights Act); see also Franklin, supra note 703, at 229-34 (reviewing the history of the 1875 Act in the lower courts).

n707. See Franklin, supra note 703, at 228-29 (calling the Department "remarkably derelict"); see also Gillette, supra note 18, at 277-78 (claiming that the federal government "showed little interest" in enforcing the Act).

n708. See Franklin, supra note 703, at 230 & n.34 (barber shops); id. at 232 & n.42 (saloons); id. at 232 & n.43 (ice cream parlors).

n709. See, e.g., Charge to Grand Jury - The Civil Rights Act, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875) (No. 18,258); United States v. Dodge, 25 F. Cas. 882, 883 (W.D. Tex. 1877) (No. 14,976); see also Gray, 11 F. at 685-86 (noting in dictum that the obligation to provide equal accommodations may sanction separate-but-equal segregation).

n710. See Franklin, supra note 703, at 233.

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The first of the Civil Rights Cases, n711 in which the Supreme Court ruled on the constitutionality of the Act, involved a Kansas innkeeper who was prosecuted by the U.S. Attorney under the Act for refusing to serve a black woman supper at the table of the inn. n712 The constitutionality of the Civil Rights Act was squarely raised as a defense, and the case reached the Supreme Court in 1876, just eighteen months after enactment of the Act. But the Supreme Court dithered for seven years before rendering a decision - waiting until October 1883. We do not know the reason for the delay. We can, however, surmise that the delay made a difference, for in the meantime the Compromise of 1877 had occurred and the national commitment to civil rights enforcement had come to an end.

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n711. 109 U.S. 3 (1883).

n712. See Franklin, supra note 703, at 233.

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After the disastrous Republican losses in the congressional elections of 1874, Republican Presidential candidate Rutherford B. Hayes apparently lost to New York Democrat Samuel Tilden in the [*1089] election of 1876. Hayes was able to scrape together the appearance of victory only by electoral fraud in the Republican-controlled states of Florida, Louisiana, and South Carolina. n713 This precipitated a political and constitutional crisis. Democrats held a majority in the House of Representatives and had sufficient votes to delay the official counting of electoral votes by filibuster and repeated dilatory motions. If the votes could not be counted by March 4, Hayes could not take office and the country would be thrown into constitutional turmoil.

Republicans and moderate Southern Democrats (many of them former Whigs) struck a bargain in which Republicans could proceed with the count and Hayes could take office, but only if federal enforcement of the Reconstruction Amendments ceased and control over their own affairs (including the civil rights of their black citizens) were returned to the electoral majorities of the Southern states. The Republicans also agreed to fund major public works projects in the South and to appoint Democrats to federal offices in place of the carpetbaggers and scalawags who had previously been the backbone of the white Republican Party in the South. Thus ended Reconstruction, in a tawdry deal to steal an election. n714 And with the end of Reconstruction came a sea-change in public, intellectual, governmental and legal opinion. Support and protection for the rights of black citizens passed away and were replaced by the regime of Jim Crow. n715 So deep and enduring was this change that no official interpretation of the Reconstruction Amendments or enforcement legislation by legislative, executive, or judicial bodies after 1876 can be assumed to be unaffected by it.

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n713. Historian C. Vann Woodward concludes: "The consensus of recent historical scholarship is that Hayes was probably entitled to the electoral votes of South Carolina and Louisiana, that Tilden was entitled to the four votes of Florida, and that Tilden was therefore elected by a vote of 188 to 181." C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction 19 (1951).

n714. For an account of the Compromise of 1877, see Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Commentary 115, 127-29 (1994).

n715. See id. at 130-33.

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Thus, the legal and intellectual climate had changed dramatically between passage of the Act in 1875 and decision of the Civil Rights Cases in 1883. By the time of oral argument, five cases raising the identical constitutional issue were on the Court's docket. Each involved exclusion from various facilities (inns, theaters, and rail [*1090] roads); in none of them were the separate accommodations "equal." In an opinion by Justice Joseph P. Bradley, the Court held the Civil Rights Act of 1875 unconstitutional in every feature except the jury provision, which was not at issue. n716 The Fourteenth Amendment, according to the Court, does not apply directly to the discriminatory acts of private persons; the Constitution is not "violated until the denial of the right has some State sanction or authority." n717 This does not mean - as is often thought - that Congress lacks the power under the Fourteenth Amendment to protect against discrimination at the hands of private parties. It means, rather, that Congress lacks the power to protect against discrimination at the hands of private parties if the laws of the state provide equal protection for all persons without regard to race.

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n716. The Civil Rights Cases, 109 U.S. 3, 24-25 (1883).

n717. Id. at 24.

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Thus, the vice of the 1875 Act, according to the Court, was that it was overbroad: "It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." n718 If the law had been confined to those cases in which state law did not provide redress, it would have been constitutional. "Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them," the Court noted, in an exposition of the common law not dissimilar to that of Charles Sumner. n719 "If the laws themselves make any unjust discrimination," the Court continued, "Congress has full power to afford a remedy under [the Fourteenth] amendment ...." n720 But if states do their duty, the Court held, the federal government has no power under the Fourteenth Amendment to interfere. This, it will be recalled, tracks arguments made by Senator Allen Thurman during the debates. n721

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n718. Id. at 14.

n719. Id. at 25.

n720. Id.

n721. See supra text accompanying notes 393-95.

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[*1091]

Under current approaches to constitutional adjudication, the Civil Rights Cases would not be decided the same way (even assuming the validity of the Court's substantive analysis of the "state action" issue). In a facial challenge to the constitutionality of an act of Congress, the statute must be sustained if it is susceptible to constitutional application in a significant number of cases. n722 In an "as applied" challenge, a statute cannot be invalidated on the basis of possible defects unless those defects are present in the case itself. n723 The problem with the Civil Rights Act of 1875, according to the Court, was that it exceeded federal power as applied to states with just and equal laws, though it would be constitutional as applied in states that fail to provide equal protection to black citizens with respect to the common law right of common carriage in covered institutions. Under the modern approach, the Act would thus be sustained on the facial challenge (because it is constitutional in some applications). In an "as applied" challenge, the Court would examine whether, in each of the five cases brought to it, the states in question in fact provided effective legal redress for violations of the rights of black patrons. In all likelihood, that inquiry would reveal that the Act was constitutional as applied.

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n722. See United States v. Salerno, 481 U.S. 739, 745 (1987).

n723. See Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

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Had Sumner been a more cautious draftsman, the 1875 Act could easily have been written to avoid the constitutional problem without losing any of its force. n724 But by the time the Act was invalidated in 1883, the political will to protect civil rights had evaporated, and an avoidable error in drafting left the problem unaddressed for over 80 years.

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n724. For example, as a predicate to federal jurisdiction, the plaintiff could have been required to allege and prove that state law did not provide equal legal redress to black and white patrons.

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The year after the Civil Rights Cases were decided, the issue of segregation came before Congress again. During debates over the proposed Interstate Commerce Act, the first comprehensive federal regulatory statute governing a major industry (railroads), James E. O'Hara, a black congressman from North Carolina, proposed an amendment as follows:

And any person or persons having purchased a ticket to be conveyed from one State to another, or paid the required fare, shall [*1092] receive the same treatment and be afforded equal facilities and accommodations as are furnished all other persons holding tickets of the same class without discrimination. n725

Both supporters and opponents interpreted the last two words of the amendment ("without discrimination") as forbidding segregation, and they assumed that without these words the railroads would be permitted to maintain separate but equal accommodations. n726 The proposal was adopted on one day by a vote of 134-97, n727 but the result was reversed the next day by a vote of 137-127. n728

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n725. 16 Cong. Rec. 296-97 (Dec. 16, 1884).

n726. A congressman from Georgia moved to amend the motion to allow railroads to provide "separate accommodations for white and colored persons," saying that there is no "good reason ... why either the colored man or the white man should object" to a rule permitting separate but equal accommodations. Id. at 316 (Dec. 17, 1884) (statement of Rep. Crisp). A supporter of this motion, Representative Herbert, commented that if it were adopted, the provision "will mean exactly what it would have meant if the words "without discrimination' in the concluding part of that amendment had been omitted." Id. Herbert maintained that "the words "without discrimination' were inserted carefully for the purpose of compelling certain gentlemen on this side to vote against the bill ...." Id. "We have no objection," he continued, "to declaring that all men shall have equal facilities and equal accommodations; but we do object to any law that compels a common carrier to put all classes of people in the same cars ...." Id. at 316-17. See also id. at 319 (statement of Rep. Brumm) (repeating that the only ground of

objection was to the phrase "without discrimination").

n727. Id. at 297 (Dec. 16, 1884).

n728. Id. at 320 (Dec. 17, 1884).

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The episode shows both a continuity and a break from the experience of ten years before. As in 1871-75, members of Congress understood the concept of racial "discrimination" to encompass segregation as well as exclusion or inequality of facilities. Thus, at the level of understanding of legal ideas and terminology, the discriminatory character of segregation was still accepted. But this time, unlike in 1871-75, the political forces favoring segregation outnumbered those opposing it. By 1884, a majority of the House of Representatives was willing to admit that segregation constituted "discrimination" - but vote for it nonetheless.

H. Analysis

Congress debated the constitutionality of school segregation and ultimately decided not to interfere. If Congress's failure to enact [*1093] legislation were dispositive - as it would be if Congress had exclusive authority to interpret and enforce the Amendment - that would be the end of the matter. But if instead we assume that the courts must interpret the Amendment in light of its most probable understood meaning at the time it was enacted, and if we treat the opinions of the congressmen as evidence of the opinions of informed people of the day, what should we make of this debate? That is, viewing this episode not as an act of lawmaking but as evidence of contemporaneous interpretation, what do we learn about the meaning that people at that time attached to the words of the Fourteenth Amendment?

As an initial matter, it is clear beyond peradventure that a very substantial portion of the Congress, including leading framers of the Amendment, subscribed to the view that school segregation violates the Fourteenth Amendment. At a minimum, therefore, the scholarly consensus must be corrected to admit that this interpretation is within the legitimate range of interpretations of the Amendment on originalist grounds. n729 But is it possible to say more: that this interpretation was the prevailing, or preponderant, view, and thus the best understanding of the original meaning? This question can be addressed from two perspectives. First, what were the specific intentions and understandings of the framing generation regarding the issue of public school segregation? Second, and more important, what was their understanding of the relevant constitutional issues - the permissibility of segregation and the status of education as a civil right?

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n729. H. Jefferson Powell makes the point in his Rules for Originalists, 73 Va. L. Rev. 659, 690 (1987), that history sometimes reveals a "range of "original understandings' " rather than a single answer.

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1. Specific Intentions Regarding School Segregation

This is what we know: (1) on ten recorded votes in the Senate and eight recorded votes in the House between 1871 and 1875, a majority (but always less than two-thirds) voted for legislation premised on the unconstitutionality of school segregation; (2) efforts to approve separate-but-equal requirements for education were invariably defeated; and (3) there was a high correlation between votes on the Fourteenth Amendment and votes in favor of school [*1094] desegregation. The following chart summarizes every vote during this period that was in favor of school desegregation or opposed to separate-but-equal. n730 Defeats for the forces supporting school desegregation are printed in italics:

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n730. The chart does not include votes on repetitive dilatory motions in the House, of which there were close to a hundred during the course of deliberations over the Act, see supra text accompanying notes 579-80, 670-71, nor a vote on a point of order in the Senate that may have been resolved on its own merits, see supra text accompanying notes 516-17.

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[SEE TABLE IN ORIGINAL]

This chart shows that the civil rights bill, containing a school desegregation provision, commanded a majority in both houses every time there was a vote, whether on the merits or on a procedural test - except when it was caught up in the politics of amnesty (December 21, 1871 and May 22, 1872) - until after the election of 1874. Margins of victory were as high as 29-16 in the Senate and 141-72 in the House. Opponents and proponents alike noted that [*1095] majorities favored the bill and attributed its failure to procedural obstacles, including supermajority vote requirements and filibuster tactics. n731

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n731. E.g., 2 Cong. Rec. app. at 477 (June 16, 1874) (statement of Rep. Darrall) (attributing the failure of the bill to parliamentary maneuvering); 2 Cong. Rec. 4083 (May 20, 1874) (statement of Sen. Thurman) ("I know that [the civil rights bill] is to pass this body ...."); id. at 383 (Jan. 5, 1874) (statement of Rep. Mills) ("It is, therefore, with no hope of success that we interpose our opposition[to the bill]."); Cong. Globe, 42d Cong., 2d Sess. 3735 (May 21, 1872) (statement of Sen. Frelinghuysen) ("The opinion of the Senate has been expressed over and over again in favor of retaining the provisions in reference to public schools."); id. at 3260 (May 9, 1872) (statement of Sen. Logan) ("There has not been a time that [Sumner's civil rights bill] could not have been passed by a majority of this Senate if you would take it up alone ...."); id. at 3251 (May 9, 1872) (statement of Sen. Blair) ("Judging from the votes which have been taken in the Senate, it is easy to perceive that there is a majority in this body for the measure proposed by the Senator from

Massachusetts."); id. app. at 217 (Apr. 13, 1872) (statement of Rep. McHenry, an opponent, predicting that "in a short time [the civil rights bill] will be passed by the same vote which ordered its third reading" and saying that its prospective passage in the Senate is "a well-ascertained fact").

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Significantly, these numbers aggregate the votes of proponents and opponents of the Fourteenth Amendment. As has been seen, opposition to the civil rights bill came not just from those (like Trumbull and Lot Morrill) who believed it went beyond the dictates of the new Amendment, but even more so from Democrats who had opposed the Amendment in 1866 and now sought to block all serious efforts to enforce it. n732 If the question is what the Amendment was thought to mean, then it is essentially irrelevant that a large group of senators and representatives continued to be unreconciled to it. Thus, although evidence that opponents of the Amendment thought that it would require school desegregation might be significant, their opposition to school desegregation is not.

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n732. See supra notes 479-91 and accompanying text.

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The following chart shows that there was a high correlation between votes on the Fourteenth Amendment and votes on school desegregation: [*1096]

[SEE TABLE IN ORIGINAL]

In the House of Representatives, until after the elections of 1874, there was a perfect correlation between votes on the Fourteenth Amendment and votes on school desegregation: every representative who had voted in favor of the Amendment in the Thirty-ninth Congress voted in favor of Butler's school desegregation bill, and every representative who had voted against the Amendment voted against it. (After the electoral debacle of 1874, some supporters voted to jettison the schools provision.) In the Senate, only Lyman Trumbull broke this uniform pattern. Except when the bill was caught up in the controversy over amnesty, every senator except Trumbull who had voted for the Amendment now voted for school desegregation. That is highly suggestive.

It might be said that the sample of those who voted on the Fourteenth Amendment in the Thirty-ninth Congress and also on the school desegregation bill is too small to support an inference regarding the meaning of the Amendment. One way to supple [*1097] ment this information is by examining the partisan breakdown on the bill, remembering that the Amendment was supported almost unanimously by Republicans and opposed almost unanimously by Democrats. Party affiliation can serve as a proxy for support or opposition to the principles of the Amendment. n733 The following chart summarizes the partisan breakdown on the key votes in the Senate and House during the three main periods of legislative activity on the bill: in 1872, 1874, and during the lameduck session in early 1875. In order to correct for the four Republican senators (Cragin, Fenton, Robertson, and Sawyer) who supported the desegregation bill on the merits but opposed coupling it with the amnesty measure, n734 and for Senator Carpenter, who supported the desegregation provisions of the bill (later changing his

mind, after Slaughter-House) but thought the jury provision unconstitutional, n735 the last column realigns their votes according to their views on the merits. n736 There are no countervailing adjustments, because no senator can be found who voted for the rider without sharing Sumner's view on the merits. n737 There is no test of support for school desegregation in the Senate in 1875 because the bill, as it came back to the Senate, did not apply to schools and there were no amendments. Democrats at all times voted unanimously against the bill, so only Republican votes are analyzed.

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n733. See supra text accompanying notes 493-94.

n734. See supra note 513 and accompanying text.

n735. See supra note 536 and accompanying text.

n736. This does not result in the switching of four votes, because Senators Sawyer and Robertson were absent on May 9 and Cragin and Fenton voted in favor of the rider on February 9 (though Cragin voted against the rider on May 9). Effectively, two votes against the rider, each time, came from supporters on the merits. Carpenter makes three.

n737. See supra text accompanying notes 511-13.

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The results are as follows:

[SEE TABLE IN ORIGINAL]

[*1098]

This chart shows that school desegregation legislation consistently won the support of at least 70% - and more often in excess of 90% - of the Republicans until the elections of 1874, when civil rights became a campaign issue for the Democrats. Even then, the bill carried the allegiance of 64% of the Republican congressmen. It can therefore be said that the predominant understanding of the Fourteenth Amendment among Republicans - the party that supported the Amendment - was that it authorized legislation outlawing school segregation.

Moreover, we must not forget that the Court in Brown v. Board of Education was faced with two interpretative choices: desegregation or separate but equal. We have assumed that the proper question is whether the original understanding supports the position of the plaintiffs in Brown. But what of the converse question: does the original understanding support the position of the defendants in Brown? Which interpretation of the Amendment was shared most widely? Every effort to adopt a separate-but-equal standard was defeated. Senator Blair's attempt in May 1872 lost by a vote of 23-30. Of the twelve Fourteenth Amendment supporters, ten opposed the separate-but-equal proposal (the exceptions being Trumbull and Sprague). n738 Senator Sargent's attempt in May 1874 lost by a vote of 21-26. Again, two of the ten surviving Fourteenth Amendment supporters (Stewart and Allison) voted for the separate-but-equal proposal. n739 Sargent's second attempt failed, 16-28. n740 Even after the 1874 elections, when it was evident that school desegregation legislation would not be passed, a

separate-but-equal proposal offered by Representative White of Alabama lost 91-114. n741 Supporters of the civil rights bill preferred to trust to the courts rather than accept separate-but-equal laws. These results can be summarized in tabular form as follows:

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n738. Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872) (reporting the Senate vote on the Blair amendment).

n739. Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with 2 Cong. Rec. 4167 (May 22, 1874) (reporting the Senate vote on the Sargent amendment).

n740. 2 Cong. Rec. 4175 (May 22, 1874).

n741. 3 Cong. Rec. 1010 (Feb. 4, 1875).

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[*1099]

[SEE TABLE IN ORIGINAL]

This is powerful evidence that separate but equal facilities were not understood at the time to comport with the equalitarian principles of the new Amendment.

This conclusion is confirmed when we look to the partisan breakdown, as the following chart shows:

Significantly, Republican opposition to segregation never fell below 77%. It should be noted, too, that much of the opposition to desegregation legislation was predicated on the theory that "social rights" and "social equality" are not fitting subjects for regulation - a position that, logically, extends to statutes mandating, as well as statutes prohibiting, segregation. Thus, the actual degree of support for state-mandated segregation laws was rather small.

In short, there are ambiguities; there was confusion and disagreement. But the weight of the evidence supports the proposition that segregation was understood in the years prior to the end of Reconstruction to be unconstitutional, especially by those who had supported the Fourteenth Amendment. In his study of the 1875 Act, De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of [*1100] 1875, n742 Alfred Avins presented a very different analysis of these votes. He argued strenuously against the result in Brown, basing his conclusion on the fact that the desegregation forces "never obtained a two-thirds vote in either House, which would have been necessary to embody it in a constitutional amendment." n743 But Avins asked and answered the wrong question. If the question were, "did opponents of school segregation have the votes to pass a constitutional amendment specifically directed to that end?" Avins might well have a point. Such an amendment almost certainly would not have garnered the two-thirds support in both houses needed for submission to the

states. The Sumner bill never did. But that is not the question. The Fourteenth Amendment meant many different things. Its application to school desegregation was only one of them, and not necessarily the most important. (The constitutionality of the Civil Rights Act of 1866, and hence the unlawfulness of the Black Codes, was foremost on the framers' minds.) It is perfectly possible that Congress proposed and the states ratified an amendment that accomplished many popular objectives, even though it was understood to have potential consequences that Congress and the states would not independently enact (at least not by two-thirds). To use an analogy from recent times, polls regularly showed strong majority support for the proposed Equal Rights Amendment, n744 even though it might well have led to drafting women into military combat, n745 which an overwhelming majority of the population opposed. n746 The real question is not whether two-thirds of Congress supported school desegregation, but whether the Amendment, which was passed by the necessary two-thirds vote, was understood to outlaw public school segregation. That seems to be the case.

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n742. Supra note 7.

n743. Avins, supra note 7, at 245.

n744. In May 1982, polls indicated that support for the ERA stood at 63%-34%, a high point. Washington News, UPI, May 7, 1982, available in LEXIS, News Library, UPI File.

n745. In hearings on the impact of the proposed amendment, most witnesses testified that it would eliminate sex-based criteria for military service. See The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 1st and 2d Sess. 254-439 (1984).

n746. See Jane J. Mansbridge, Why We Lost The ERA 64-65, 81 (1986) (reporting that surveys indicated that only 22 percent of the public thought that women should be drafted into combat).

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[*1101]

2. Constitutional Principles

It is widely agreed among originalists that the intentions or understandings of the framers regarding a specific issue, while informative, are not ultimately authoritative, for it is their understanding of the constitutional principles embodied in the constitutional provision - not their analysis of a particular legal phenomenon - that is controlling. To determine those principles, we must divide the question of school segregation into two: (1) is separation by race inconsistent with the requirement of equality, and (2) does the equality requirement of the Fourteenth Amendment apply to public education? There were many who answered "yes" or "no" to both questions, but there were some who divided their answers. Indeed, the collective judgment of the Congress in 1875 seemed to be "yes" to the first question and "no" to the second.

The Senate answered "yes" to both questions on a number of occasions, most clearly in May 1874, when it passed Sumner's bill by a vote of 29-16. Votes in the House of Representatives, however, determined the ultimate shape of the legislation. On that fateful day in February 1875, after years of deliberation, the House of Representatives reached three decisions about the civil rights bill. First, by a vote of 162-99, it outlawed segregation in inns, public conveyances on land or water, theaters, and other places of public amusement. The language employed to achieve this end was the proposition that "all persons" have the right to "the full and equal enjoyment" of the accommodations, advantages, facilities, and privileges provided by the covered services "subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color." n747 This vote reflected both a normative-constitutional judgment that segregation is/ought to be unconstitutional, which was contested, and a verbal-interpretive judgment that segregation is a denial of the "full and equal enjoyment" of the covered facilities (and not an instance of conditions "applicable alike" to all citizens). The latter judgment was not contested: opponents as well as proponents of the Act understood that it proscribed segregation. Interestingly, this interpretive judgment survived for another decade, to the debate over the proposed [*1102] Interstate Commerce Act, when the term "without discrimination" was again understood by all sides to outlaw segregation; by this time, however, the normative-constitutional judgment had switched.

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n747. See 3 Cong. Rec. 939 (Feb. 3, 1875).

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Second, the House voted, 114-91, to reject an amendment that would have allowed "separate common schools for different races or colors," as well as "separate accommodations, facilities, and privileges" in common carriers and public accommodations, so long as the separate facilities were "equal in facilities and equipments for both races." n748 This confirms and extends the normative-constitutional judgment already noted. Not only did Congress vote in favor of legislation demanding "full and equal enjoyment" of the covered facilities, but it voted against the alternative, which would have permitted separate facilities so long as they were "equal" in material respects. Further, Congress made clear that the objection to formal recognition of the separate-but-equal principle extended to schools.

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n748. See supra notes 675, 680 and accompanying text.

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Third, the House voted, 128-48, to eliminate common schools and cemeteries from coverage of the bill. As explained above, this reflected a combination of a political and a normative-constitutional judgment: first, that a majority would not extend the principle of desegregation to public education, and second, that it was preferable that the law be silent than that it countenance the principle of separate but equal. n749 If school segregation is consistent with the original understanding as reflected in this history, therefore, it must be because of the special status of schools. It is not because segregation was

deemed to be a form of equality.

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n749. See supra text accompanying notes 683-91.

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There are two possible interpretations of Congress's ultimate decision to pass a desegregation bill that did not apply to schools. First, it might be understood as nothing more than an unprincipled accommodation to popular sentiment. This was the opinion of many congressmen of both parties. For example, Representative John B. Storm, Democrat from Pennsylvania, observed that if one believed "that in order to enjoy his equal rights with the white man the colored man must enjoy those rights in the same railroad car, in the same theater, and at the same table in the hotel or public inn," [*1103] as the final version of the Act provided, "I should certainly insist upon his enjoying the right to an education in the same school-room with the white children. I regard the right to an education the most sacred one which the colored man can enjoy," he continued, "and yet gentlemen on the other side who expect to pass this bill intend ... to strike out the provision with regard to schools. If they are consistent I cannot see how they can do this ...." n750 Representative Ellis Roberts, Republican from New York, stated: "For one, sir, I am not willing to legislate that colored men shall have their rights in the theater and to refuse to legislate that they shall have their rights in the schools." n751 Under this interpretation, the 1875 Act shows that segregation was understood to be inconsistent with the Fourteenth Amendment, but that Congress flinched when it came to applying that principle to the controversial area of public education. This interpretation provides no principled support for the defendants in Brown.

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n750. 3 Cong. Rec. 951 (Feb. 3, 1875).

n751. Id. at 980 (Feb. 4, 1875).

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A second interpretation of Congress's actions is that education might not have been thought to be a civil right. This position was championed in the Senate by Lyman Trumbull, whose credentials as a supporter of the goals of the Fourteenth Amendment were impeccable, and gained the backing of respectable Northern Republicans Lot Morrill and Orris Ferry. Moreover, it explains the shape of the final Act as it emerged from the House in 1875: forbidding segregation in common carriers and public accommodations, but leaving the issue of schools to the states. Sumner and his allies articulated powerful legal responses to this position, to be sure, and defeated it in a number of tests of strength in nonfinal votes in the House and Senate, but they did not prevail in the end.

But taking this to be an authoritative reading of the original understanding, it does not follow that public education could not be deemed a civil right as of 1954, for the original understanding of the legal concept, "civil right," introduces a degree of contingency. The Fourteenth Amendment did not create new rights, but only extended the established privileges and

immunities of the most favored class of citizens to all citizens, without discrimination on the basis of race. If white children had no firmly established, [*1104] legally enforceable right to a public education, then denial of a similar right to black children was not an inequality. If even a substantial number of states lacked a legally enforceable right to education, this undermined the claim that public education was a "civil right" or a "privilege or immunity of citizenship." Not all positive law rights in each state were civil rights for purposes of the Fourteenth Amendment; according to many, that status was reserved for rights that were sufficiently widespread and entrenched that they had come to be understood as privileges and immunities of citizenship. As has been noted, there was a substantial basis for uncertainty about the legal status of public education as late as the 1870s. n752 Education was then at a time of transition, and it was far from clear that any child had a legally enforceable "right" to it, at least in most states. By the turn of the century, however, this uncertainty had been resolved. Every state in the Union had established a universal system of compulsory education funded by public taxation. n753 The right to publicly funded education was embedded in the constitutions of the states, and the common school had attained its modern role as the principal institution for the inculcation of American ideals of citizenship - a role envisioned, perhaps prematurely, by proponents of the Sumner bill. It had become unthinkable that any state would abolish its schools - as unthinkable as it was, in 1871-75, that any state would abrogate the common law rights of its white citizens. By the turn of the century - and certainly by the time of the Brown decision in 1954 - there could be little doubt that schools satisfied the criteria even the opponents of the 1875 Act understood for the existence of civil rights. The right to education had become stable, uniform, and legally enforceable.

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n752. See supra text accompanying notes 439-49.

n753. See John C. Eastman, When Did Education Become a Civil Right? A Working Hypothesis (January 31, 1994) (unpublished manuscript, on file with the Virginia Law Review Association).

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Far from confirming the conventional wisdom that school segregation was tolerated or even approved by the generation that framed and ratified the Fourteenth Amendment, the history of the Civil Rights Act of 1875 in fact refutes it. The Act constitutes an official declaration by the body entrusted with enforcement of the Amendment that segregation is a form of inequality. Moreover, a [*1105] large majority of the party that supported the Amendment - perhaps three-fourths - was willing to apply that principle to public schools. That application was defeated, but the constitutional principle that explains the ultimate resolution of the segregation question in the 1875 Act - requiring desegregation of common carriers but not of public schools - was based on the rudimentary character of public education at that point in history. Applying the legal understanding of civil rights that prevailed in 1875 to the institution of public education as it existed by the turn of the century, one can conclude only that the principle of equality in civil rights leads directly to the decision in Brown v. Board of Education.

3. Caveats

Although the deliberations over the 1875 Act provide the best evidence of what the Fourteenth Amendment was understood to mean on the question of segregation, there are certain inherent limitations in the argument. To prove that a majority of the members of Congress between 1871 and 1875 supported legislation premised on the unconstitutionality of school segregation does not conclusively prove that this was the predominant understanding of those who drafted and ratified the Amendment in the period 1866 to 1868. In this Subsection I will address the three most troubling potential pitfalls in the analysis, and ask how probable it is that they affect the ultimate conclusion. n754

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n754. I am particularly grateful to Michael Klarman for raising some of the points addressed in this Subsection.

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a. Changes in Popular Opinion

My argument depends on a continuity in opinion during the nine-year period from the proposal of the Fourteenth Amendment through the passage of the Civil Rights Act of 1875. There is much to support a claim of such continuity: the Reconstruction period is ordinarily understood by historians as a distinct political era in which a particular political faction, with a particular political and constitutional agenda, dominated the federal government and pursued a consistent and coherent program. Many of the leaders of the movement to adopt the Fourteenth Amendment went on to lead the movement for the Civil Rights Act of 1875. The support [*1106] ers of the Act understood it to be a mere extension of the principles of the 1866 Civil Rights Act. The arguments regarding Reconstruction measures, pro and con, show a striking similarity throughout the period.

Nonetheless, it is undeniable that public opinion - including the opinions of leading supporters of civil rights - changed between the periods 1866-68 and 1871-75. Opinions held during the latter period therefore are not a wholly reliable indicator of the opinions held during the former. An analogy might be drawn to the shift of opinion on affirmative action that occurred among supporters of civil rights between passage of the Civil Rights Act of 1964 (when affirmative action was explicitly disavowed) n755 and a decade later (when affirmative action was firmly entrenched). In much the same way, Republican attitudes toward the race question may have become more radical as Reconstruction proceeded. Indeed, the attitude toward black suffrage suggests such a shift. In 1866, the Radicals were unable to secure enough votes to guarantee black political rights in the Fourteenth Amendment, and the Republican Party expressly disclaimed any commitment to black enfranchisement in its 1868 party platform. n756 By early 1869, however, the political winds had changed

and the Congress proposed the Fifteenth Amendment, which was quickly ratified by 1870. Perhaps a similar shift explains the willingness to vote for desegregation legislation after 1871.

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n755. See United Steelworkers v. Weber, 443 U.S. 193, 230-55 (1979) (Rehnquist, J., dissenting) (analyzing the legislative history of the Civil Rights Act of 1964).

n756. See National Party Platforms 1840-1972 39 (Donald Bruce Johnson & Kirk H. Porter, compilers, 5th ed. 1973).

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The argument, however, cuts both ways. While Reconstructionist fervor apparently increased between 1866 and 1870, there is reason to believe that it cooled considerably in the years after 1870. Southern treatment of the freedmen outraged the North in the late 1860s, but as Grant's second term wore on, civil rights increasingly became a political liability for the Republicans. n757 A nation that in 1868 voted overwhelmingly for the Republicans, the party of civil rights, voted almost as overwhelmingly for their opponents in 1874. n758 The declining enthusiasm for civil rights can be seen in the [*1107] careers of statesmen like Trumbull of Illinois, who was principal sponsor of the Civil Rights Act of 1866 but who, by 1872, was a Liberal Republican, and by 1877 a Democrat again. As Edmunds derisively observed in 1872, Trumbull "seems to have ... spent all the love for equal rights that he had." n759 In 1875, Democratic Representative Storm of Pennsylvania could say that General Ben Butler "did not represent any longer the moral and political sentiments of the American people" n760 - as much an acknowledgment of past Radical strength as it was a claim of present Radical decline. The shift can be seen among Democrats, as well. In 1872, the Democrats adopted a party platform pledging support for equal rights so strong that Republicans insisted on attaching it as a preamble to the 1875 Act. n761 By that time, however, the Democrats were in unanimous opposition to civil rights legislation, and they considered their 1872 platform an embarrassment. n762

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n757. See Foner, supra note 21, at 524-25.

n758. See id. at 523.

n759. Cong. Globe, 42d Cong., 2d Sess. 3264 (May 9, 1872).

n760. 3 Cong. Rec. 951 (Feb. 3, 1875) (emphasis added).

n761. Id. at 1011 (Feb. 4, 1875). The passage in question affirmed that:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political ....

Id.

n762. Representative Niblack, a Democrat from Indiana, protested the reading of the platform provision on the ground that the Party had been "intimidated" into adopting it. Id. at 1003 (Feb. 4, 1875).

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The shifts in public opinion between 1866-68 and 1871-75 thus make any inference based on the latter period uncertain, but they do not push in one direction or the other. In the end, reliance on evidence from this period seems neither more nor less warranted than the accepted practice of relying on evidence from the administrations of the early Presidents in interpreting the Constitution of 1787. If we were to reject this evidence, consistency would demand that we cease looking to the practices of the Washington Administration in interpreting separation of powers or to those of Presidents Jefferson and Madison in interpreting the Religion Clauses.

b. Conflict Between Congressional and Popular Understandings

A second potential weakness in my argument is that popular opinion, especially as reflected in the results of the election of 1874, [*1108] may have conflicted with congressional opinion, and that it is the understandings of "We, the People" that must control constitutional interpretation. Why treat the congressional deliberations in 1874 as more authoritative than the elections of 1874? This, too, is a serious point, and it undoubtedly weakens the thesis of this Article - but not much. There are both empirical and theoretical reasons not to view the 1874 elections as reflective of the authentic voice of the Fourteenth Amendment.

It is a parlous enterprise to deduce popular understandings of the meaning of a legal instrument from the results of an election, which typically hinge on a number of issues. While school desegregation was obviously unpopular, especially in the South, so was the corruption, economic depression, and "Grantism" represented by the Republican Party. n763 To be sure, Democrats and some Republicans interpreted the election of 1874 as a mandate against the civil rights bill, and this perception undoubtedly played a major part in determining the political fate of the proposed legislation. But thoughtful legislators could, and did, interpret the results in a different way. Consider the following comments: James Garfield remarked that "the recent disasters of the republican party have not sprung from any of the brave acts done in the effort to do justice to the negro." n764 John Shanks observed that Republican losses were concentrated among the "timid" who had "been afraid to stand up here and do right" and that forthright supporters of the bill had been reelected. n765 Finally, General Butler lamented "that it is my deliberate conviction that the reason why some here have not been sent back is because we did not pass this bill a year ago. The people turned from us," he continued, "because we were a do-nothing party, afraid of our shadows .... The republican party [*1109] being neither hot nor cold, the country rightly spewed us out of its mouth." n766 Of course, it is always possible for true believers to say that the problem with an unpopular policy is that it was not taken far enough. The difficulty for historical analysis is that sometimes they are right.

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n763. Historians are divided on the relative importance of the economic and Reconstruction issues to the election of 1874. William Gillette describes the election as "a referendum not only on reconstruction but also on civil rights." Gillette, supra note 18, at 256. Eric Foner, however, maintains that "the depression far outweighed Reconstruction as a cause of Republican defeat." Foner, supra note 21, at 524. See also Richard H. Abbott, The Republican Party and the South, 1855-1877, at 230 (1986) ("The backlash against civil rights, Northern dissatisfaction with the Grant administration's policy in dealing with the Panic of 1873, and a growing disillusionment with Reconstruction and Republican regimes in the South all led Northern voters to repudiate the Republicans.").

n764. 3 Cong. Rec. 1005 (Feb. 4, 1875).

n765. Id. at 1003.

n766. Id. at 1009.

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A more fundamental reason to rely more heavily on the congressional deliberations is that they were conducted in constitutional terms by officers sworn to uphold the Constitution. Whether the statements and votes of the representatives and senators were an act of constitutional interpretation, as opposed to mere political decisionmaking, will be considered below; but the voters in the election of 1874 were almost surely acting on the basis of preferences and policy rather than conscientious reflection on the demands of the new constitutional order.

Finally, far more than other amendments, the Fourteenth Amendment was a congressional creation. The states and the people exercised little control. The state ratification debates did not dwell on the details of the proposed Amendment, and - an important point - the margin of victory for the Amendment was attained by coercion of the Southern states rather than by winning the support of the electorate in three-fourths of the States. When an Amendment obtains its supermajority through congressional exercise of its power to condition readmission of states to the Union, it is a fiction to treat the opinions of the people of the various states as controlling; it is Congress that effectively exercised the amendatory power.

In any event, to the extent that the elections of 1874 represent a backlash against civil rights and the congressional deliberations of 1874 represent a political view from an earlier stage, it is hard to see why the later view - being more distant both in time and in spirit from the Amendment - should be given more weight. The elections of 1874 were the beginning of the end of Reconstruction. The Reconstruction Amendments should not be interpreted to conform to the preferences of those who halted their enforcement. [*1110]

c. Interpretation and Policymaking

Even assuming that it has been established that a strong majority of both houses of Congress in 1872-74 voted for legislation that would desegregate public schools, the question remains: does this demonstrate that they believed that the Fourteenth Amendment compelled school desegregation, or was this merely their judgment about wise public policy? Essential to my argument here is the assumption that the members of Congress understood themselves to be enforcing the dictates of the Constitution and not merely deciding whether they believed public schools should be segregated. This issue requires consideration of the nature of the authority vested in Congress under Section 5 of the Amendment, which reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." n767

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n767. U.S. Const. amend. XIV, 5.

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There are five possible constructions of the relationship between legislation passed pursuant to Section 5 and the Amendment itself. First, it might be thought that the Privileges or Immunities Clause does not refer to any fixed set of rights (or even to a fixed methodology by which the interpreter can discern the set of protected rights), but that Congress has the authority to determine, by legislation, what are the "privileges or immunities of citizens of the United States." This interpretation would imply that, at least insofar as this Clause is concerned, Congress has the power not only to "enforce" but also to define the substantive reach of the Amendment. If, for example, Congress decided that the right to abortion (or protection from abortion) were a privilege or immunity of American citizens, then it could enact legislation to that effect, without regard to whether the Constitution would have that meaning of its own force. If this is the proper meaning of Section 5, then the majority support in Congress for school desegregation in 1872-74 does not imply that the courts had the authority to order school desegregation in 1954.

Second, it can be said that congressional action is necessary only to supplement the dictates of the Constitution itself - that is, to go beyond the dictates of the bare Constitution. Thus, congressional enactment of legislation to forbid a certain practice implicitly suggests that Congress did not believe that practice to be indepen [*1111] dently unconstitutional. If the practice is already unconstitutional, there is no need for legislation. If Congress perceives a need for legislation, this suggests that Congress did not understand the practice to be unconstitutional. Thus, legal historian Bernard Schwartz has argued with respect to the deliberations over the 1875 Act:

The 1874-75 debates on the proposed prohibition of racial discrimination in schools are directly relevant to the question of the intent of those who wrote the Fourteenth Amendment with regard to segregation in education. One who reads what is said in the debates ... cannot help but conclude that the Congress that sat less than a decade after ratification of the Fourteenth Amendment did not think that the amendment had the effect of prohibiting school segregation which the Supreme Court was to attribute to it in the Brown v. Board of Education case of 1954. Certainly, if such effect had been considered to flow from the

amendment, the whole debate on the proposed school provision in 1874-75 would have been irrelevant, for integrated schools would have been constitutionally required, regardless of any congressional provision in the matter. n768

Third, it can be said that the Fourteenth Amendment is enforceable only through Acts of Congress passed pursuant to Section 5. In the words of the Supreme Court in Ex parte Virginia: n769

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n768. Schwartz, supra note 13, at 660.

n769. 100 U.S. 339 (1880).

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It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed.... It is the power of Congress which has been enlarged[.] Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. n770

This construction would suggest that the courts are not empowered to hold school segregation unconstitutional in the absence of an Act of Congress to that effect. Since Sumner's efforts failed, Brown was wrongly decided.

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n770. Id. at 345.

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Fourth, it can be said that Congress has the authority under Section 5 to provide remedies for the enforcement of the rights and prohibitions of the Amendment, but not to expand or contract the underlying rights. Under this theory, a majority vote of Congress [*1112] to provide a remedy for a particular practice demonstrates that the majority deems that practice unconstitutional, but failure to provide a statutory remedy does not strip the courts of their inherent authority to enforce the Amendment as a matter of judicial review.

Fifth, it might be said that Congress has not just the authority but the duty to provide effective remedies for violations of the Amendment. This is the strongest case for treating the deliberations over the 1875 Act as a form of constitutional interpretation. For any member holding this view, a vote in favor of the Act is tantamount to a declaration that the practices forbidden by it are unconstitutional, and a vote against the Act is tantamount to a declaration that they are not.

Thus, under the first approach the history of the 1875 Act is not directly relevant to the constitutional question, under the second and third approaches the history is inconsistent with the result in Brown, and under the fourth and fifth approaches the history supports the result.

The second and third approaches outlined in the previous paragraphs are flatly wrong. If it were correct that a vote to outlaw a practice under the Section 5 power is an implicit judgment that the practice is not independently unconstitutional, then Congress's reenactment of the Civil Rights Act of 1866 in 1870 would be proof that unequal protection of the rights of contract, property, and security of the person was not viewed by the Congress of the day as unconstitutional. This is obviously preposterous. The theory is likewise inconsistent with Congress's enactment in 1870 of a statute declaring that all otherwise qualified citizens are entitled to vote without distinction based on race. n771 Legislation passed for the purpose of enforcing the Fourteenth Amendment typically will outlaw practices deemed by Congress to violate the Fourteenth Amendment, as even a cursory glance at the legislative history of any of the Reconstruction statutes will confirm.

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n771. See Civil Rights Act of 1870, ch. 114, 16 Stat. 140. Under Professor Schwartz's analysis, this statute would be proof that the Fifteenth Amendment did not outlaw racial discrimination with respect to the franchise.

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The third position is closer to the truth, but still inaccurate. It is true that supporters of Reconstruction distrusted the courts and believed that congressional action would be needed to achieve the [*1113] promise of the new Amendments. It was not unnatural that they would be skeptical of reliance on the institution that had produced Dred Scott v. Sanford n772 and Ex parte Milligan. n773 Only a few years before, Congress had felt it necessary to strip the Supreme Court of its jurisdiction to consider the legitimacy of Reconstruction government in Ex parte McCardle. n774 Thus, Section 5 reflected the common expectation that Congress, not the courts, would be the principal agency for enforcement of the Fourteenth Amendment. Senator Oliver Morton captured this understanding during the debates over the 1875 Act in his remark that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress." n775

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n772. 60 U.S. (19 How.) 393 (1857).

n773. 71 U.S. (4 Wall.) 2 (1866).

n774. 74 U.S. (7 Wall.) 506 (1868).

n775. Cong. Globe, 42d Cong., 2d Sess. 525 (Jan. 23, 1872).

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But it cannot seriously be maintained that the courts were understood to have no authority to enforce the Amendment in the absence of congressional action. The initial formulation of the Fourteenth Amendment was simply a grant of additional authority to Congress:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property. n776

In that form, the Amendment would not have served as an independent basis for judicial review. In its final version, by contrast, Section 1 imposes restraints on the states and Section 5 gives Congress the authority to enforce them. Many supporters of the Amendment stated that this would not only provide a firm constitutional basis for the Civil Rights Act of 1866, but would constitutionalize it and thus prevent its repeal by future Congresses. Representative Giles Hotchkiss of New York, who proposed this change, explained that civil rights should be "secured by a constitu [*1114] tional amendment that legislation cannot override." n777 Hotchkiss added: "Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him." n778 This history shows that Section 1 has force independently of acts of Congress and that congressional legislation is not a necessary predicate to judicial enforcement; the very point of the change was to ensure that future enforcement of the Amendment could not be stymied by unsympathetic Democrat-controlled Congresses. After collapse of support for school desegregation legislation in 1875, Representative James Monroe of Ohio voted to strike all reference to schools, in preference to a separate-but-equal provision, largely on the expectation that the courts would intervene. Blacks in the South, he said, "think their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing [separate-but-equal] provisions ...." n779 This clearly indicated his belief that the courts have the power to strike down school segregation even in the absence of congressional legislation - though of course legislation would make that result all the more secure.

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n776. Cong. Globe, 39th Cong., 1st Sess. 1091 (Feb. 28, 1866).

n777. Id. at 1095; accord id. at 2459 (May 8, 1866) (statement of Rep. Stevens); id. at 2462 (statement of Rep. Finck); id. at 2462 (statement of Rep. Garfield); id. at 2498 (May 9, 1866) (statement of Rep. Broomall); id. at 2896 (May 30, 1866) (statement of Sen. Howard).

n778. Id. at 1095.

n779. 3 Cong. Rec. 998 (Feb. 4, 1875).

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The first approach is logically possible, but with one possible exception, n780 there is no evidence that any participant in the deliberations over the 1875 Act conceived of Congress's authority in this way. If it were believed that Congress has discretion to determine what the civil rights of Americans should be (as opposed to [*1115] determining what they are, and insisting upon an equality of enforcement), one would expect proponents of the Act to have argued in those terms, for it would have pretermitted the complicated constitutional argument about education and civil rights. No one did. Instead, the

predominant view among Republicans was that the 1875 Act did not create new rights, but only created new remedies. n781 Representative Lynch commented that the bill "simply confers upon all citizens, or rather recognizes the right which has already been conferred upon all citizens, to send their children to any public free school ...." n782 Lynch explained, incidentally, that his constitutional judgment was based on a strict construction of congressional powers and the belief "that the Constitution as a whole should be so construed as to carry out the intention of the framers of the recent amendments ...." n783

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n780. Robert Hale of New York claimed he had voted against the Fourteenth Amendment solely on account of the excessive power given to Congress under Section 5. Id. at 979 (Feb. 4, 1875). Relying on McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Hale interpreted Section 5 as meaning that "within the grant of power by the Constitution to Congress for purposes of legislation Congress are authorized to select in their own discretion all measures appropriate to the end in view; that the question of fitness or desirability is for Congress alone and not for the courts." Id. at 980. In context, it is not clear whether Hale was referring to substantive rights or to remedies. In any event, Hale voted against the Cessna amendment to restore the school provision, so it is not possible to say that support for the school desegregation position was predicated on this constitutional theory. More likely, by exaggerating the degree of congressional power, Hale was retrospectively justifying his opposition to the Fourteenth Amendment.

n781. See, e.g., Cong. Globe, 42d Cong., 2d Sess. 3192 (May 8, 1872) (statement of Sen. Sherman); id. at 3264 (May 9, 1872) (statement of Sen. Edmunds).

n782. 3 Cong. Rec. 945 (Feb. 3, 1875) (emphasis added).

n783. Id. at 943.

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That leaves the fourth and fifth possibilities. While there were more than a few comments about the policy and expediency of the bill, the essential position of the proponents was that the bill was a necessary and appropriate means of enforcing rights already established by the Constitution. Senator Edmunds, for example, stated: "This bill proceeds upon the idea that the Constitution does secure to the citizen certain inherent rights, because they are rights, and then it merely undertakes to enforce those rights ...." n784 By the same token, opponents thought they had refuted the proponents' position when they showed that, in their opinion, "the fourteenth amendment [does not] enjoin[] upon us that we shall have mixed schools." n785 One thing on which "both sides agree," according to Edmunds - and he went uncontradicted - was that the question was one of constitutional interpretation, not of legislative policy:

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n784. 2 Cong. Rec. 4172-73 (May 22, 1874).

n785. Id. at 4171 (statement of Sen. Sargent).

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Either ... the democratic view of the [fourteenth] amendment is right, that it does not touch these subjects at all, and therefore we cannot interfere with the right of the State to regulate its common [*1116] schools ... or else it does confer upon citizens of the United States a right, and that right is inherent n786

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n786. Id. at 4172.

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It is not clear whether proponents felt under a constitutional obligation to pass the bill (once they had concluded that it would protect previously violated constitutional rights) or whether they merely believed they had authority to do so. Many Republicans argued that Congress had not just the power but the duty to enact effective remedies. Senator Henry Pease commented that he would vote for the Civil Rights Act of 1875 "because I believe that it is the bounden duty of the American Congress to enforce the provisions of the fourteenth amendment to the Constitution." n787 Representative Ransier said that Congress has a "duty" to pass appropriate legislation to ensure a "full and complete" remedy for violations of the Fourteenth Amendment. n788 Representative William Lawrence of Ohio, one of the original supporters of the Fourteenth Amendment, delivered the Republicans' most extensive disquisition on the significance of Section 5. Lawrence first argued that the schools provision was constitutionally compelled, on the ground that "equal privileges" in places and institutions supported by public taxation are protected by the Equal Protection Clause. n789 He then argued at length that Congress had the power to enforce that right. "The fourteenth amendment was designed to secure this equality of rights;" he maintained, "and we have no discretion to say that we will not enforce its provisions. There is no question of discretion involved except as to the means we may employ." n790 Democrats denied the existence of such a duty, arguing that "as legislators it is as much your duty to look to the expediency of a law in reference to your constituents as to look to its constitutionality." n791 It seems probable that many Republicans, as well as Democrats, viewed the nature and extent of "appropriate" legislation as a matter of legislative discretion rather than constitutional duty.

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n787. Id. at 4153 (May 22, 1874).

n788. Id. at 383; accord 3 Cong. Rec. 980 (Feb. 4, 1875) (statement of Rep. Hale); 2 Cong. Rec. 410 (Jan. 6, 1874) (statement of Rep. Elliott).

n789. 2 Cong. Rec. 412 (Jan. 6, 1874).

n790. Id. at 414.

n791. 3 Cong. Rec. 952 (Feb. 3, 1875) (statement of Rep. Whitehead).

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[*1117]

A vote in favor of legislation outlawing segregation was thus an implicit (and often an explicit) statement regarding the congressman's interpretation of the Fourteenth Amendment. These debates were as much acts of interpretation as they were of lawmaking. Thus, if it is established that a majority supported legislation to forbid school segregation under Section 5, this proves that the majority understood the Fourteenth Amendment to forbid the racial segregation of public schools.

IV. The Supreme Court's Desegregation Decisions

Now we are able to examine the Supreme Court's principal decisions regarding desegregation in light of the original understanding, as revealed in the debates over the Civil Rights Act of 1875. I consider only the most important decisions: one contemporaneous with deliberations over the Act, one decided a generation later in the heyday of Jim Crow legislation, and, finally, one that brought the era of formal de jure segregation to an end.

A. The First Desegregation Decision

Surprisingly few people - even among constitutional lawyers - have heard of the Supreme Court's first case involving the lawfulness of racial segregation. n792 Yet in 1873, in Railroad Company v. Brown, n793 (a remarkable coincidence of names) the Supreme Court unanimously held that the cars of a commuter railway must be desegregated, on the ground that segregated facilities are inherently unequal. n794 This, according to the Court, was the prevailing view in Congress in the mid-1860s. n795

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n792. I could find no reference to the case in Laurence H. Tribe, American Constitutional Law (2d ed. 1988), or in any of six leading constitutional law casebooks, and there is no entry for the case in the Encyclopedia of the American Constitution (Leonard W. Levy, Kenneth L. Karst & Dennis J. Mahoney eds., 1986).

n793. 84 U.S. (17 Wall.) 445 (1873).

n794. Id. at 453.

n795. Id.

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In 1863, Congress authorized the Alexandria and Washington Railroad Company to extend its line northward to connect with another rail line in the District of Columbia. In so doing, Congress attached the condition "that no person shall be excluded from the [*1118] cars on account of color." n796 Notwithstanding this provision, the Railroad instituted a policy of separate but equal transportation for its route between Washington and Alexandria. In the run from Washington to Alexandria, the front car was reserved for blacks and the other car for whites; in the return run the placement was reversed. In this way, the company guaranteed that the facilities provided persons of the two races were identical, and "alike comfortable." n797

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n796. Id. at 446. This was one of a series of acts passed by Congress at the instigation of Senator Sumner, requiring desegregation of railways and streetcars in the District of Columbia. See Maltz, supra note 155, at 558-63.

n797. Brown, 84 U.S. (17 Wall.) at 447.

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On February 8, 1868, just five months before the ratification of the Fourteenth Amendment was complete, Catharine Brown, a black employee of the United States Senate, attempted to board the car reserved for whites. A railroad employee told her to go to the other car, and when she demurred he "put her out with force, and, as she alleged, some insult." n798 She sued. The railroad defended on the ground that "it has literally obeyed" the congressional conditions prohibiting exclusion of any person from the cars on account of color "because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them." n799 In other words, segregation was not "literally" discrimination.

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n798. Id. at 447-48.

n799. Id. at 452. The railroad's "plain language" argument drew its force from the particular wording of the statute, which forbade exclusion of any person on account of race "from the cars" - rather than from "any car." Id. at 446.

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The case was argued to the Supreme Court and decided in 1873, in the midst of congressional debates over what would become the Civil Rights Act of 1875, during a period in which, according to the conventional wisdom, the lawfulness of segregation was firmly and widely accepted. The Court's reaction to the railroad's separate-but-equal argument is therefore extremely revealing. The Justices characterized that argument as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement." n800 The Court conceded that the words of the statute "taken literally might bear the interpretation put upon them" by the railroad, but stated [*1119] that "Congress did not use them in any such limited sense." n801 The Court noted that there had been no need for legislation guaranteeing that the company would not exclude black passengers altogether; "self-interest" would suffice to prevent that. n802 "It

was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time," and Congress acted in the "belief that this discrimination was unjust." n803 Indeed, the Court commented, "in the temper of Congress at the time, it is manifest the grant could not have been made without" the condition. n804

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n800. Id. at 452.

n801. Id.

n802. Id.

n803. Id. at 452-53.

n804. Id. at 453.

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This first desegregation case did not involve the Fourteenth Amendment, but presented merely a statutory question, and it is perhaps for this reason that it has been forgotten. Yet at heart, the issue is not much different from the question as it would arise under the Fourteenth Amendment: n805 whether separate but equal facilities are a form of racial discrimination. On this point, it is significant that the Court did not merely find that its interpretation was the most plausible. It found the meaning "obvious" and the counterargument "ingenious." It used the term "discrimination" three times as embracing segregation. The Court specifically recalled "the temper of Congress at the time" and described it as "manifest" that Congress would not have allowed the railroad to extend its line if it were going to segregate the cars. This was the only time during Reconstruction that the Supreme Court would address the issue of segregation, and the opinion in Brown reinforces the conclusion of the 1875 Act debates: that, contrary to the conventional wisdom, during the brief period between the end of the Civil War and the end of Reconstruction segregation was widely considered discriminatory and unjust. Just possibly, the Supreme Court understood "the temper of Congress at the time" of the Fourteenth Amendment better than it has been understood since.

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n805. Putting aside the state-action problem, which relates in this context to the common carrier status of the railroad.

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[*1120]

B. Plessy v. Ferguson

At issue in the 1875 Act debates was whether federal law could forbid private railroads and other common carriers to segregate their passengers by race. By the time of Plessy v. Ferguson n806 in 1896, the issue was whether

state law could compel segregation. Plessy involved a Louisiana statute, passed in 1890, requiring railroads in the state to "provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations." n807 Statutes of this sort, which were a recent development in state law, n808 were strongly opposed both by black citizens and by many railroads. Maintenance of separate facilities was a considerable expense, which railroads did not care to undertake. Indeed, in many Southern states an alliance between black citizens and railway interests successfully staved off Jim Crow legislation until the turn of the century, after Plessy had already been decided. n809 The railroad company in the Plessy case cooperated with the challenge to the law, and it is rumored that it may even have contributed to the costs of Plessy's litigation.

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n806. 163 U.S. 537 (1896).

n807. Act of July 10, 1890, No. 111, 1890 La. Acts 152, 153 (quoted in Plessy, 163 U.S. at 540).

n808. See supra text accompanying notes 173-77.

n809. For a detailed discussion of the politics of Jim Crow laws in South Carolina, see Matthews, supra note 174. For an economic analysis of the companies' position and the enactment of Jim Crow statutes, see Jennifer Roback, The Political Economy of Segregation: The Case of Segregated Streetcars, 46 J. Econ. Hist. 893 (1986).

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Over a justly famous dissent by Justice John Marshall Harlan, the Supreme Court upheld the Louisiana statute. There are many interesting features of the case, treated at length in a book by historian Charles A. Lofgren. n810 The only question I will address is whether the decision comports with the original understanding of the Fourteenth Amendment, as revealed in the debates over the 1875 Act.

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n810. Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation (1987).

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In the most obvious sense, Plessy involved precisely the question debated and resolved by the Congress in 1875: whether black citizens have a constitutionally protected right, equal to that of white [*1121] citizens, to accommodation on common carriers such as railroads. But the Court reached an answer opposite to that reached by the Congress in 1875. To the Congress, segregation of common carriers was a violation of the letter as well as the spirit of the Fourteenth Amendment. Railroads had well established common law obligations to serve all paying customers without discrimination; application of the 1875 Act to railroads was the least controversial part of the proposed bill. In 1872, Matthew Carpenter's watered-down civil rights bill, which mandated

desegregation of common carriers but not schools or juries, passed the Senate by a 2-1 margin. n811 Even after the 1874 elections, the common carrier provisions passed both houses of Congress by wide margins (162-99 in the House; 38-26 in the Senate n812). Proposals to allow separate but equal facilities were repeatedly rejected, the last attempt, in February 1875, failing by a vote of 91-114 in the House. n813

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n811. Cong. Globe, 42d Cong., 2d Sess. 3736 (May 21, 1872); see supra text accompanying notes 545-61.

n812. 3 Cong. Rec. 1011 (Feb. 4, 1875) (House); id. at 1870 (Feb. 27, 1875) (Senate).

n813. Id. at 1010 (Feb. 4, 1875).

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Each of the arguments accepted by the Plessy majority had been urged in debate by the Act's opponents, but had been refuted by the proponents and ultimately rejected. The Court began its analysis of the Fourteenth Amendment issues n814 with the proposition, familiar from the Civil Rights Act debates, that desegregation was an attempt to enforce "social equality." The Court explained the "object of the amendment" as

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n814. The Court quickly disposed of Plessy's argument based on the Thirteenth Amendment, finding it "too clear for argument" that a "statute which implies merely a legal distinction between the white and colored races ... has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." Plessy, 163 U.S. at 542, 543. The Court noted that the Thirteenth Amendment had been thought "insufficient" to protect against laws imposing "onerous disabilities and burdens" on members of the colored race, and that the Fourteenth Amendment was "devised" to remedy this insufficiency. Id. at 542. Whether or not this is a valid interpretation of the Thirteenth Amendment, it is true that opponents of segregation during the 1875 Act debates relied principally on the Fourteenth.

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undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce [*1122] social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. n815

This argument had been a central feature of the 1875 Act debates, and was refuted by proponents of the Act. They pointed out, persuasively, that desegregation was mandated only in the context of public facilities where patrons were already required to rub shoulders with other persons not of their choosing. Unless all persons with whom one shared a railway car thereby become

one's social equals (including "thieves, prostitutes, gamblers, and others who have worse sins to answer for than the accident of color," as Confederate General P.G.T. Beauregard put it n816), then to ride in the same car was no sign of social equality. n817 On the contrary, the line between "civil" and "social" rights was the line between law and private choice. Because the law already governed the matter of who had access to common carriers, this matter was seen to fall in the civil sphere. Equality was to reign in the civil sphere.

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n815. Id. at 544. To the extent that the Court meant to imply that black citizens desired segregation just as much as whites, this was a fiction exploded during the 1875 Act debates, see supra text accompanying notes 315-18, and was no more true in the 1890s.

n816. 2 Cong. Rec. app. at 479 (June 16, 1874) (quoted by Rep. Darrall).

n817. This is a summary of arguments discussed previously; see supra text accompanying notes 323-61.

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Indeed, the "social equality" argument was even more implausible in Plessy than in the 1875 Act debates, because the question in Plessy was not whether the state would seek to enforce equality upon unwilling private parties, but whether the state could prevent willing parties from associating voluntarily with one another. It was a frequent theme of Democratic rhetoric against the 1875 Act that the matter of "social rights" and "social equality" could not be the subject of legislation. Representative H.D. McHenry of Kentucky, a staunch opponent of the 1875 Act, argued that the manner in which a person travels, is educated, or obtains entertainment "is a matter of contract, in which the law has no right to interfere." He continued:

If a man sees proper to associate with negroes, to eat at the same table, ride on the same seat with them in cars, or sees proper to send his children to the same schools with them, and place himself [*1123] upon the same level with them in any regard, I would not abridge his right to do so n818

Thurman, the leading Northern Democratic opponent of the bill in the Senate, couched this argument in libertarian language:

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n818. Cong. Globe, 42d Cong., 2d Sess. app. at 217 (Apr. 13, 1872).

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What is the true idea of civil liberty? It is simply that every citizen shall have a right to do what to him seemeth good, so far as he can do so without infringing the rights of others or endangering the peace of society or

the existence or just powers of the Government. n819

If "the Government" interferes with this right, Thurman declared, it becomes a "tyrant." n820 He thus opposed the bill not because of a belief in segregation as such, or even in states' rights, but in defense of "liberty" - the liberty for individuals, through private institutions, to decide such matters for themselves. Similarly, Senator Sargent of California objected to the proposition that the government should "interfere with the business of railroad companies and hotel-keepers in this inquisitive way," invoking the "old maxim" that it was "the best government which governed the least." n821 But while this libertarian position may have supported the opponents' side in the 1875 controversy, it plainly was an argument in favor of Plessy in 1896. As Justice Harlan stated: "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each." n822

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n819. Id. at 27 (Feb. 6, 1872).

n820. Id.

n821. 2 Cong. Rec. 4174-75 (May 22, 1874).

n822. Plessy, 163 U.S. at 557 (Harlan, J., dissenting).

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The Plessy Court also reiterated arguments, offered unsuccessfully by opponents of the 1875 Act, that segregation is not a form of inequality. Recall that in the 1875 Act debates, this claim took two forms. According to the formal argument, segregation was not unequal because it was imposed equally on persons of both races. The Plessy Court referred to this argument but hesitated to embrace it, adopting instead the second form of the argument - that the social meaning of segregation did not imply an imposition [*1124] of inferior status upon blacks. The Justices apparently recognized that the formal equality argument would undermine settled understandings of civil rights, even for white citizens. Indeed, it was counsel for the plaintiff, Plessy, who articulated the formal argument as a parody of the defendant's position:

[Counsel for Plessy suggests] that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. n823

In other words, if segregation is not recognized as a form of discrimination,

then the government would be free to enact legislation that all would recognize as discriminatory. The Court was not willing to embrace so sweeping a position. "The reply to all this," the Court said, "is that every exercise of the police power must be reasonable," which the Court defined as "enacted in good faith for the promotion [of] the public good, and not for the annoyance or oppression of a particular class." n824 Symmetrical treatment was not enough; the ground of distinction must be reasonable. The Court thus abandoned explicit reliance on the formal argument, acknowledging that segregation would be unconstitutional if enacted for the "annoyance or oppression of a particular class." This made constitutionality turn on the purposes of the legislation rather than a syllogistic conception of equality.

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n823. Id. at 549-50.

n824. Id. at 550.

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Justice Harlan squarely confronted the formal equality argument with a formal argument of his own. He contended that the Constitution does not "permit any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights." n825 A law is discriminatory if those who administer it are required to [*1125] know the race of the persons affected. In other words: "Our Constitution is color-blind." n826 In this, Harlan was appealing to a conception of civil rights that had figured prominently in the arguments of proponents of the 1875 Act. n827 Although proponents of the Act had not used the term "color-blind," Representative Lynch had stated that the lawmaker's duty was "to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." n828 Sumner similarly said that the law "makes no discrimination on account of color," n829 and Senator Pratt had insisted that "free government demands the abolition of all distinctions founded on color and race." n830

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n825. Id. at 554 (Harlan, J., dissenting).

n826. Id. at 559 (Harlan, J., dissenting).

n827. See supra text accompanying notes 286-91.

n828. 3 Cong. Rec. 945 (Feb. 3, 1875).

n829. Cong. Globe, 42d Cong., 2d Sess. 385 (Jan. 15, 1872).

n830. 2 Cong. Rec. 4083 (May 20, 1874); accord Cong. Globe, 42d Cong., 2d Sess. 819 (Feb. 5, 1872) (statement of Sen. Wilson).

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Rather than argue that segregation is definitionally equal treatment, the majority in Plessy argued that, understood in light of the social circumstances, segregation of the races did not "necessarily imply the inferiority of either

race to the other." n831 In the most famous passage of the opinion, the Court explained:

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n831. Plessy, 163 U.S. at 544.

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We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if ... the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. n832

This echoes many statements by opponents of the 1875 Act. n833 It is especially reminiscent of a speech by Senator Cooper of Tennessee:

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n832. Id. at 551.

n833. See supra text accompanying notes 292-300.

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But, sir, it is said that they [black Americans] desire this law, or something similar, because it is an indignity to their race; and they [*1126] feel it as an indignity to their race to be refused admission to the different places here mentioned. Have they no pride of race and of kindred? Is there nothing in their nature that makes them proud of their race as the white man is of his? Think you that it would trouble the Anglo-Saxon for any other race to turn him aside? Think you he would care? n834

The argument, however, did not carry the day in the 1875 Act debates. More compelling was Sumner's assertion that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." n835 Senator Frelinghuysen called segregation by law "an enactment of personal degradation" and a form of "legalized disability or inferiority," effectively a denial of citizenship and a return to slavery. n836 Far from conceding that segregation would be perceived as inoffensive if the shoe were on the other foot, Sumner, after describing the effects of segregation, felt confident in declaring that "this is plain oppression, which you, sir, would feel keenly were it directed against you or your child." n837 In the end, though schools were excluded from the bill, a large majority of both houses of Congress outlawed segregation in common

carriers in plain rejection of the Plessy Court's argument.

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n834. 2 Cong. Rec. 4155 (May 22, 1874).

n835. Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (Dec. 20, 1871).

n836. 2 Cong. Rec. 3452 (Apr. 29, 1874).

n837. Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

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Indeed, the Plessy majority, like the opponents of the 1875 Act, engaged in self-contradiction on this point. On the one hand, they maintained that segregated facilities are objectively equal, but on the other they complained that desegregation was an attempt to foster "social equality." But if segregated facilities really were equal, then social equality already would exist. If members of the "white race" - including the Justices in the majority - "choose" to construe racially mixed facilities as an imposition of "social equality," how can they fault the "black race" for construing segregated facilities as an imposition of social inequality?

The Plessy Court's inference that any badge of inferiority perceived by black citizens from the Jim Crow laws was a product of their own imaginations was so implausible that Justice Harlan, in dissent, suggested in effect that it was knowingly false. "The thin disguise of 'equal' accommodations for passengers in railroad [*1127] coaches will not mislead any one," he observed. n838 "All will admit," Justice Harlan said, conspicuously overlooking his brethren, that the segregation laws "proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens[.]" n839 The true social meaning of the segregation laws, he maintained, is so obvious that it is universally understood. n840

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n838. Plessy, 163 U.S. at 562 (Harlan, J., dissenting).

n839. Id. at 560 (Harlan, J., dissenting).

n840. Professor Herbert Hovenkamp's study showing that the Plessy decision was in accord with the then-prevailing social scientific understanding of racial differences, see Hovenkamp, supra note 332, while perhaps exonerating the Justices of the charge that they were "prejudiced" in the sense of being ignorant of the best available evidence, does not exonerate them from the charge that they misrepresented the known social meaning of segregation. To be sure, the Justices may have been in tune with the "best" scientific approach of the day in believing that inequality is rooted in the natural inferiority of the black race; but that does not gainsay the fact that segregation was universally understood as implying the superiority of one race and the inferiority of the other, as Harlan correctly observed. Hovenkamp's argument goes to the reasonableness of the Plessy Court's preference for inequality, not to whether segregation was understood to imply inequality.

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Finally, according to the Court, the case "reduces itself to the question whether the statute of Louisiana is a reasonable regulation," and in "determining the question of reasonableness [the state] is at liberty to act with reference to the established usages, customs and traditions of the people." n841 This analysis - the key to the decision - is mistaken as to both law and fact. It is true that the established usages, customs, and traditions of the people are relevant to determining the civil rights (or privileges or immunities) of the people. That is why application of the Act to schools was a genuinely difficult question in 1875. But established usages, customs, and traditions were not relevant to determining whether to allow distinctions of race or color with respect to those traditionally-established civil rights. Indeed, the Fourteenth Amendment was understood and intended to make an upheaval in the established usages, customs, and traditions of the people with regard (at least) to the equal citizenship of the race of former slaves. The content of "civil rights" may be conventionally determined, but the equality of rights is fixed by constitutional law. That is the essen [*1128] tial, fundamental normative core of the Amendment, which even opponents of the 1875 Act could not deny. n842

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n841. Plessy, 163 U.S. at 550.

n842. See, e.g., 2 Cong. Rec. app. at 314 (May 22, 1874) (statement of Sen. Merrimon) (observing that "the general purpose of [the Reconstruction Amendments] was to liberate the negro race and to confer upon them exactly the same civil rights that are enjoyed by the white citizens of the United States").

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Thus, even if it were true that railroads customarily were required to separate passengers by race, it would not justify the practice under the Fourteenth Amendment. But it was not true. Far from being an "established usage, custom, or tradition," the Jim Crow law in Plessy was an innovation. The Louisiana legislature passed the law in 1890, less than two years before Homer Plessy sought a seat in the white people's coach on the East Louisiana Railway. The first such law in the land - that of Florida - was passed in 1887. n843 The "established custom," after the end of Reconstruction, was to leave this matter to the discretion of the private market, which sometimes resulted in segregation and sometimes resulted in mixed transportation. Jim Crow laws were passed toward the end of the century in order to change the status quo - to mandate a degree of separation between the races far more rigid and complete than the disorganized private sphere had produced. n844

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n843. Act of May 19, 1887, ch. 3743, 1887 Fla. Acts and Resolutions 116.

n844. See Woodward, supra note 72, at 105 (calling Jim Crow "an elaborate program of legislation to change the relations between races").

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There was a real irony, then, in the Court's claim that "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences." n845 It was the Jim Crow legislators in the Southern states (not Plessy) who sought to use legislation to affect racial instincts - to shore up and intensify racial prejudice that was not strong enough to produce thoroughgoing apartheid without the assistance of law.

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n845. Plessy, 163 U.S. at 551.

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In an important sense, the Plessy Court's position was more extreme even than that taken by the leading opponents of desegregation in 1875. If "social rights" must be left to private choice, as Thurman, McHenry, Hill, Durham and others argued, n846 then laws mandating segregation would be no less objectionable than laws prohibiting segregation. Indeed, Plessy could have used the words [*1129] of the opponents of the 1875 Act to support his attack on Jim Crow laws. For example, Representative Durham of Kentucky had argued that "we have no more right or power to say who shall enter a theater or a hotel and be accommodated therein than to say who shall enter a private house." n847 If that is true for desegregation, it is equally true for segregation. Thus, the holding of Plessy should be recognized as inconsistent not only with the congressional majority's desegregationist interpretation of the Fourteenth Amendment, but even with the Democratic minority's position that social relations are outside the legitimate sphere of regulation.

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n846. See supra notes 335-39 and accompanying text.

n847. 2 Cong. Rec. 405 (Jan. 6, 1974).

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This "social rights" argument was linked with the "state action" argument, where the arguments of the opposition in 1871-1875 likewise tend to support Plessy's position in 1896. A principal question in the 1875 Act debates was whether federal intervention was necessary to enforce the right, common to all citizens, to enjoy the benefits of common carrier transportation without regard to their race. One of the most common arguments of the opponents was that Congress lacked power to legislate directly regarding the practices of railroads and other private businesses. This was based on the proposition that even if the equal benefit of the law of common carriers is a privilege and immunity of citizens (a "civil right"), the Fourteenth Amendment is not implicated until and unless a state makes or enforces a "law" that "abridges" that right. Senator Gordon of Georgia conceded that the Fourteenth Amendment "inhibits any State from passing laws denying to any citizens of the United States the immunities and privileges which belong to other citizens of the United States," but "until that law is passed, however - until by statute a State denies some right which belongs to all citizens of the United States ... Congress has no power under the fourteenth amendment to interfere." n848 Similarly, Senator Thurman argued that

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n848. 3 Cong. Rec. 1864 (Feb. 27, 1875). The specific context of his remarks was the jury provision of the bill, but the theory would apply to other issues.

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this bill is only to secure privileges and immunities, and in respect to them the Constitution is plain that no State shall make or enforce any law to deprive any citizen of them, and it is equally [*1130] clear that you have no right to interfere until the State has made or enforced such a law. n849

The leading speaker against the Act in the House, Alexander Stephens, took a similar position. n850 Under this view, segregation by force of custom, private decision, or even discretionary action of individual officials is outside the strictures of the Fourteenth Amendment; but an actual statute compelling discrimination - like the Louisiana statute at issue in Plessy - would be a violation.

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n849. Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872).

n850. 2 Cong. Rec. 380 (Jan. 5, 1874) (stating that enforcement of the Fourteenth Amendment is limited to "the judgments of courts . . . declaring any State act in violation of the prohibitions to be null and of no effect").

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Opponents of the 1875 Act stoutly maintained that there were no laws - even in the Southern states - that abridged the common law right of black passengers to equal service. Representative John Atkins, a lawyer from Tennessee, "appealed to the myriads of State statutes to-day" and "confidently asserted that in all that mass of laws there is not to be found one that discriminates between its citizens [on the basis of] race, color, or previous condition of servitude." n851 He said that "there is no State statute forbidding colored people from entering any of the schools, churches, inns, theaters, &c. They are only required to submit to even chances with white people." n852 Atkins' statement may have been an exaggeration (there were such laws that applied to schools), but as applied to common carriers it was accurate. There were no laws in the Southern states compelling separation of the races in common carriers at the time the Civil Rights Act of 1875 was debated. No one could make such a statement by the time of Plessy.

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n851. 2 Cong. Rec. 454 (Jan. 7, 1874).

n852. Id.; accord 3 Cong. Rec. 980 (Feb. 4, 1875) (statement of Rep. Lamar).

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The Supreme Court avoided the force of this argument only by repeatedly misstating the question presented in Plessy. Thus, it maintained that "if the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." n853 This conveniently overlooked the fact that Jim Crow laws required segregation and imposed criminal penalties upon those who sought to meet together in covered institutions by voluntary [*1131] consent. "Legislation is powerless," said the Court, "to eradicate racial instincts or to abolish distinctions based upon physical differences." n854 That is a debatable proposition, but it turns the issue on its head. No one in Plessy was seeking "legislation" to abolish distinctions; Plessy was challenging legislation enforcing racial distinctions imposed upon the private market by the state. The Court was wrong in framing the issue as whether the Fourteenth Amendment would "enforce social ... equality." n855 The question was whether the Amendment would tolerate state legislation to enforce social inequality. n856

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n853. Plessy, 163 U.S. at 551.

n854. Id.

n855. Id. at 544 (emphasis added).

n856. It has become common in constitutional scholarship to presume a link between Plessy and the laissez-faire doctrines of the Lochner era, taking at face value some of the misleading statements by the Court in its opinion. See, e.g., Bruce Ackerman, We The People: Foundations 146-50 (1991); Cass R. Sunstein, The Partial Constitution 42-51 (1993). But Jim Crow was manifestly not a product of laissez-faire ideology. Passage of the segregation laws coincided with an upsurge of agrarian-oriented regulation, especially of railroads. The progressive reform movement in the South, with few exceptions, was also the white supremacist movement. Woodward, supra note 72, at 91. Jim Crow laws swept the Southern legislatures when, buffeted by the depression of the 1890s, the business-oriented "conservatives" who had dominated Southern politics were displaced by the "progressives," and even the conservatives sought to maintain their political position by switching to white supremacy.

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As has been seen, the congressional majority in the years immediately following ratification of the Fourteenth Amendment believed that the common law had already interfered with the private market with respect to the duty of common carriage and public accommodation. They therefore understood themselves simply to be extending the same rights to black citizens as already existed for whites. Some thought that this went too far in invading the rights of private businesses, but they were voted down. Against this backdrop, Plessy was not a difficult case. If the majority thought that segregation must be prohibited, and a large part of the minority thought that it should be left to private choice, that does not leave much support for a law that interferes with private choice by compelling segregation.

C. Brown v. Board of Education

Just as the Court unconsciously echoed the arguments of opponents of the 1875 Act in its opinion in Plessy, the central proposi [*1132] tion of Chief Justice Earl Warren's opinion in Brown v. Board of Education n857 could have come from the mouth of Charles Sumner. To separate children "from others of similar age and qualifications solely because of their race," Warren wrote, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." n858 The Plessy Court had good reason to be silent about the source of its ideas: the historical authorities standing behind the Plessy decision were, for the most part, senators and representatives hostile to the Fourteenth Amendment and the 1875 Act. To rely openly on the arguments of the opponents would have tended to discredit the decision. By contrast, the historical progenitors of the Brown decision were the champions of the Reconstruction Amendments and, on relevant constitutional issues, the victors in the debates over its meaning and enforcement.

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n857. 347 U.S. 483 (1954).

n858. Id. at 494.

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One would never know this from reading the opinions. Indeed, the Brown opinion, with its talk of not "turning the clock back," n859 gives every impression that the Court thought it was struggling against the historical understanding and original meaning of the Constitution - an impression that, I am now convinced, was unnecessary and even misleading. The Court summarized the historical evidence in just three sentences:

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n859. Id. at 492. The Court's full statement was that "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." The word "even" in this sentence is very odd, for it suggests that it would have been less of a strain to turn the clock back to 1896 than to 1868. It suggests that the Court saw the jurisprudential challenge more in terms of precedent (Plessy in 1896) than original understanding (ratification in 1868). If the Court had taken an originalist approach, it would have seen that the history of the Reconstruction period offered a principled basis for rejecting the erroneous precedent of 1896. It is important to turn the clock back to the proper year.

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The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most

limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty. n860

[*1133] The problem with this summary is that it treats the relevant dispute as between the "most avid proponents" of the Amendment and those "antagonistic" to it. But the Amendment passed. That is no longer the question. The question now is what the Amendment meant - not to its most avid proponents or most virulent enemies, but to the great mass of citizens and their representatives, who had the authority to add this Amendment to the Constitution. That a significant segment of the population was hostile to the Amendment is utterly irrelevant to its meaning (except insofar as their understanding of the meaning of the Amendment casts light on its commonly accepted meaning). Nor does it matter what the Amendment's most avid proponents "intended" (except insofar as they claimed, and others accepted, that their intentions had been embodied in the Amendment). And most importantly, the summary implies that nothing useful is known about what "others in Congress and the state legislatures" thought. These "others" - presumably those who supported the Amendment but were not its "most avid" proponents - were no less articulate than the extremes. They participated in deliberations, they voted, and they made constitutional arguments. They provided the votes to pass legislation outlawing segregation in common carriers, and majority support in both houses for legislation to desegregate the public schools. The uncertainties here are not greater than in other areas of constitutional law, in which the Court boldly acts on the basis of the best knowledge it can summon about the relevant provisions.

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n860. Id. at 489.

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From a vantage point of forty years, it may not seem to matter much that the Court missed the historical argument, so long as it reached the proper decision. But at the time of Brown, it was far from clear that the Court's decision would carry the day. It invited massive resistance in the South, much of it in the enraged tones of those who thought that the Constitution had been willfully misinterpreted in service of social engineering. It was, indeed, more than a decade before the desegregation decision was actually enforced - and then, the agent of change was the Congress. n861 The first and foremost public argument of the resistance was based on history. The so-called Southern Manifesto (signed by virtually the [*1134] entire congressional delegations of the states of the Deep South, thereby lending respectability and authority to the resistance) was based primarily on the supposed inconsistency between the Court's decision and the history of the Fourteenth Amendment. n862 It invoked the debates over the Fourteenth Amendment, segregation of schools in the District of Columbia, practices of the Northern states, and other popular half-truths canvassed in Section I of this Article. The Manifesto exploited the Court's implicit concessions regarding this history to full advantage, and declared that the Court "with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land." n863 Might it not have helped for the Court to have shown that its "personal political and social ideas" were shared by the champions of the Amendment at the time - and even conceded, in important respect, by much of the Southern Democratic opposition? While not even the most effective opinion for the Court could have easily reconciled the

segregationist South to this seemingly radical social change, the opinion offered no answer to the critics on what they perceived to be their strongest ground. If ever the Court needed to invoke the hallowed authority of the framers of the Constitution, this was the time. But the Court did not, and due to its neglect of history, could not.

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n861. See Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 39-172 (1991).

n862. The Southern Manifesto was the most authoritative and widely publicized statement of opposition to Brown. In an invitation to resistance, it "commended the motives of those states which have declared the intention to resist forced integration." Text of 96 Congressmen's Declaration on Integration, N.Y. Times, Mar. 12, 1956, at 19.

n863. Id.

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Having unnecessarily created the impression that the historical understanding of the Fourteenth Amendment was consistent with de jure segregation, the Court proceeded to address the constitutional question in ways that are curious, and seemingly counterproductive. As noted above, the two grounds for legal argument over the constitutionality of segregated public education are: (1) whether education is a civil right, and (2) whether segregation is unequal. The Brown opinion addresses both of these issues, but in ways that depart from the theoretical grounding of the desegregation legislation of the Reconstruction Congress. [*1135]

The Court correctly noted that the place of education in American life had undergone a dramatic transformation in the years between enactment of the Fourteenth Amendment and the decision in Brown, and that these changes were relevant to the constitutional question. n864 In the earlier era, no child - white or black - could be said to have a "right" to a common school education in much of the nation. The common school system, especially in the South, was uneven, spottily funded, and in many localities nonexistent. This gave some plausibility to the claims of those opponents of school desegregation legislation who claimed that education was not a civil right. As the Brown Court noted, however, things had changed by 1954, and this should have produced a different legal conclusion.

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n864. See Brown, 347 U.S. at 492-93.

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Unfortunately, the Brown Court did not frame the question in terms of whether education was a civil right, but rather in terms of whether education was "important." n865 This rather missed the point. Not everything that is "important" is a civil right and - more to the point - not everything that is a civil right is "important." The constitutional principle is that black citizens are entitled to a perfect and complete equality in all matters of civil right.

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n865. Brown, 347 U.S. at 493.

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The analytical confusion is compounded by the Court's apparent belief that the importance of education is a feature that could distinguish Brown from Plessy. While far from clear, the most natural reading of Brown is that the desegregation principle applies only "in the field of public education" and not to transportation or other areas of life. n866 In light of the Court's discussion of the "importance" of education, the apparent rationale for distinguishing education from transportation is that the latter does not have such a strong connection to "democratic society," the performance of "public responsibilities," "good citizenship," or the "opportunity" [*1136] to "succeed in life." n867 The irony is that, in the nineteenth century, the right to nondiscriminatory access to common carriers was far more firmly established as a "civil right" than was the incipient right to a public education. As education evolved into an enforceable legal right, that did not differentiate it from the right to common carriage, but put it on the same constitutional footing. The Court's attempt to distinguish rather than overrule Plessy is utterly inconsistent with the constitutional theory on which the Civil Rights Act of 1875 rested.

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n866. See id. at 494-95. The Court did not overrule the earlier decision, stating only that "any language" in Plessy contradicting the "finding" that segregated education is unequal is "rejected." Id. The Court stated its holding as follows: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." Id. at 495. This strongly suggests that the "language" in Plessy that was "rejected" was its discussion of segregated education, and that the doctrine of separate but equal might well continue to be valid in the context of transportation.

n867. Id. at 493.

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Moreover, this analytical confusion had a practical consequence. Many Southerners, not unnaturally, read the opinion as implying that in matters of lesser importance, including transportation, segregation would be permissible. This purchased trouble for future cases. Education may well be "the most important function of state and local governments," n868 but in the years immediately after Brown, plaintiffs brought cases involving segregation of some distinctly less important functions of government, from airport coffee shops to municipal auditoriums. What would be the Court's answer in those cases? It decided these cases - among the most controversial in its history - by per curiam orders and summary dispositions, without any serious discussion of the merits. n869 Never did the Court get around to informing the nation of the legal basis for desegregating the South, outside the context of education. In Johnson v. Virginia, n870 a case involving a segregated courtroom decided eight years after Brown, the Court finally announced that "a State may not constitutionally require segregation of public facilities." n871 The only reason the Court

gave, however, was that [*1137] this issue was "no longer open to question." n872 It is embarrassing that the first of the three cases cited for this proposition, Mayor of Baltimore City v. Dawson, n873 had supplied no reasons whatsoever; the second, Turner v. City of Memphis, n874 rested solely on the precedents of Dawson and Brown, with no explanation for the extension of the holding; and the third was Brown, which appeared to be based, in some sense, on the peculiarly important character of education. n875 The Court thus forfeited its opportunity to explain the real basis for its decision, which is rooted in an equality of rights - not in the importance of education.

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n868. Id.

n869. See, e.g., Schiro v. Bynum, 375 U.S. 395 (1964) (per curiam) (municipal auditorium); Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (restaurant in municipal airport); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (per curiam) (athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (public golf course and parks); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (public transportation); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf courses); Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (per curiam) (municipal amphitheaters).

n870. 373 U.S. 61 (1963) (per curiam).

n871. Id. at 62.

n872. Id.

n873. 350 U.S. 877 (1955) (per curiam).

n874. 369 U.S. 350 (1962) (per curiam).

n875. See Johnson, 373 U.S. at 62 (citing Dawson, Turner and Brown).

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The second constitutional issue was whether segregation is a form of inequality. Here the Brown opinion is on stronger ground, in its rejection of the Plessy Court's conclusion that segregation does not import a stigma of inequality. n876 But even here, the Court adopted a rhetoric that would give color to the resistance. Rather than root its decision in constitutional and legal principle, historical evidence, or even in the common sense of the matter, the Brown Court portrayed its disagreement with the reasoning of Plessy as turning on differences in "psychological knowledge." n877 In a famous footnote, the Court cited books and articles from the social science literature, n878 concluding that its holding was thus "amply supported by modern authority." n879 This weakened the force and persuasiveness of the Court's holding, for two reasons.

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n876. Brown, 347 U.S. at 494-95.

n877. Id. at 494.

n878. Id. at 494 n.11.

n879. Id. at 494.

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First, it made the unconstitutionality of segregation appear to be contingent on controversial and potentially changeable empirical judgments, in the evaluation of which the Supreme Court has no natural competence or authority. n880 The problem was particularly acute because the leading piece of social science evidence, Kenneth [*1138] Clark's famous study of the selection of black and white dolls, did not evidently support the Court's conclusion. n881 This invited such reactions as the notorious trial in the Southern District of Georgia, in which the court took evidence on the empirical validity of the social science evidence in Brown and, having concluded that it was faulty, refused to follow the decision. n882

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n880. Compare Justice Antonin Scalia's remarks in Lee v. Weisman, 112 S. Ct. 2649, 2681 (1992) (Scalia, J., dissenting), about "psychology practiced by amateurs": "A few citations of "research in psychology' that have no particular bearing upon the precise issue here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing." (Citations omitted.) Whether or not this response is fair and valid, it should be evident that reliance on contestable psychological studies to overturn democratic decisions is bad judicial rhetoric.

n881. The study had no control group, and when replicated in jurisdictions with desegregated schools showed effects even larger than those in the South. For evaluations of Brown's use of social scientific evidence, see Edmond Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157-68 (1955); Symposium, The Courts, Social Science, and School Desegregation, 39 Law & Contemp. Probs. 1 (1975).

n882. Stell v. Savannah-Chatham Bd. of Educ., 220 F. Supp. 667 (S.D. Ga. 1963), rev'd, 333 F.2d 55 (5th Cir. 1964), cert. denied, 379 U.S. 933 (1964).

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Herbert Hovenkamp's study, Social Science and Segregation Before Brown, offers the further cautionary note that the nineteenth-century decisions upholding segregation were based on then-prevailing social scientific knowledge no less than Brown was based on the social scientific knowledge of its day. n883 There is no reason to assume modern "science" - or for that matter, modern philosophy - will be congruent with our constitutional principles. Social science evidence certainly has its place in the law, and judges should not be ignorant of the real-world effects of their decisions. But the Court sacrifices its position of authority when it makes judgments appear to rest on contested issues of empirical fact, ordinarily the stuff of legislative resolution, instead of constitutional principles, which are entrusted to the Court's charge. To submerge the issue of constitutional principle weakened the force of the

Court's opinion in Brown.

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n883. See Hovenkamp, supra note 332, at 664-65.

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Second, the emphasis on the psychological and pedagogical effects on black schoolchildren distracted attention from the social function of segregation in Southern society. I stated at the beginning of this Section that the Court's comment on the effects of segregation on the "hearts and minds" of the schoolchildren could have come from Sumner. But effects of this sort were not at the heart of Sumner's opposition to segregation. The critical point, according to Sumner and his allies, was the formal expression of subordination. "Any rule excluding a man on account of his [*1139] color," Sumner said, "is an indignity, an insult, and a wrong ...." n884 Frelinghuysen called segregation by law "an enactment of personal degradation" and a form of "legalized disability or inferiority." n885 The key issue was equality before the law. Even if the motivations and achievements of black schoolchildren were not measurably affected by segregation, it still would be inconsistent with the Fourteenth Amendment's insistence on equality of citizenship for the state to brand members of one race as too "inferior and degraded" n886 to mix with the other.

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n884. Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (Dec. 20, 1871).

n885. 2 Cong. Rec. 3452 (Apr. 29, 1874).

n886. Plessy, 163 U.S. at 560 (Harlan, J., dissenting).

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This is not a proposition of psychology, to be studied in controlled experiments and disputed in technical journals. It is a matter of constitutional principle and common moral understanding. When segregationists complained of the attempt to force "social equality," they were admitting, quite clearly, that segregation is part and parcel of a system of inequality. The Court should have held that the state may play no part in such a system. That is what Sumner would have said:

It is easy to see that the separate school founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of Equality ....

... Colored children, living near what is called the common school, are driven from its doors, and compelled to walk a considerable distance, often troublesome and in certain conditions of the weather difficult, to attend the separate school. One of these children has suffered from this exposure, and I have myself witnessed the emotion of the parent.... Now, it is idle to assert that children compelled to this exceptional journeying to and fro, are in the

enjoyment of equal rights.

... The indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong.

... Surely the race enslaved for generations has suffered enough without being compelled to bear this prolonged proscription. n887

[*1140] And we should not allow the ultimate fate of the Civil Rights Act of 1875 to obscure the fact that on this fundamental interpretation of the requirement of equality, Sumner carried large majorities of both houses of Congress with him, even as Reconstruction was drawing to a close. Sumner's words were the authentic voice of the Reconstruction Amendments, well worth the effort of turning the clock back.

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n887. Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

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Conclusion

Racial segregation presented the most important question of constitutional law in the decade of Brown, but that question was addressed by the courts in an historical vacuum, as if constitutional law were a matter of social policy rather than legal principle. Most commentators have assumed that the ahistorical quality of Brown was unavoidable, because an historical approach to the question would have produced a morally unacceptable answer. This Article shows, to the contrary, that school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment.

Between 1870 and 1875, both houses of Congress voted repeatedly, by large margins, in favor of legislation premised on the theory that de jure segregation of the public schools is unconstitutional. The desegregation bills never became law because, for procedural reasons, a two-thirds majority of the House of Representatives was required for final passage. Even so, the Reconstruction Congress passed legislation prohibiting segregation of inns, theaters, railroads, and other common carriers, and rejected legislation that would have countenanced segregated education on a separate-but-equal basis. The Court in Brown refused to "turn the clock back." But had it done so, it would have discovered strong support for its holding - stronger than the dubious "modern authority" on which the Court relied.